

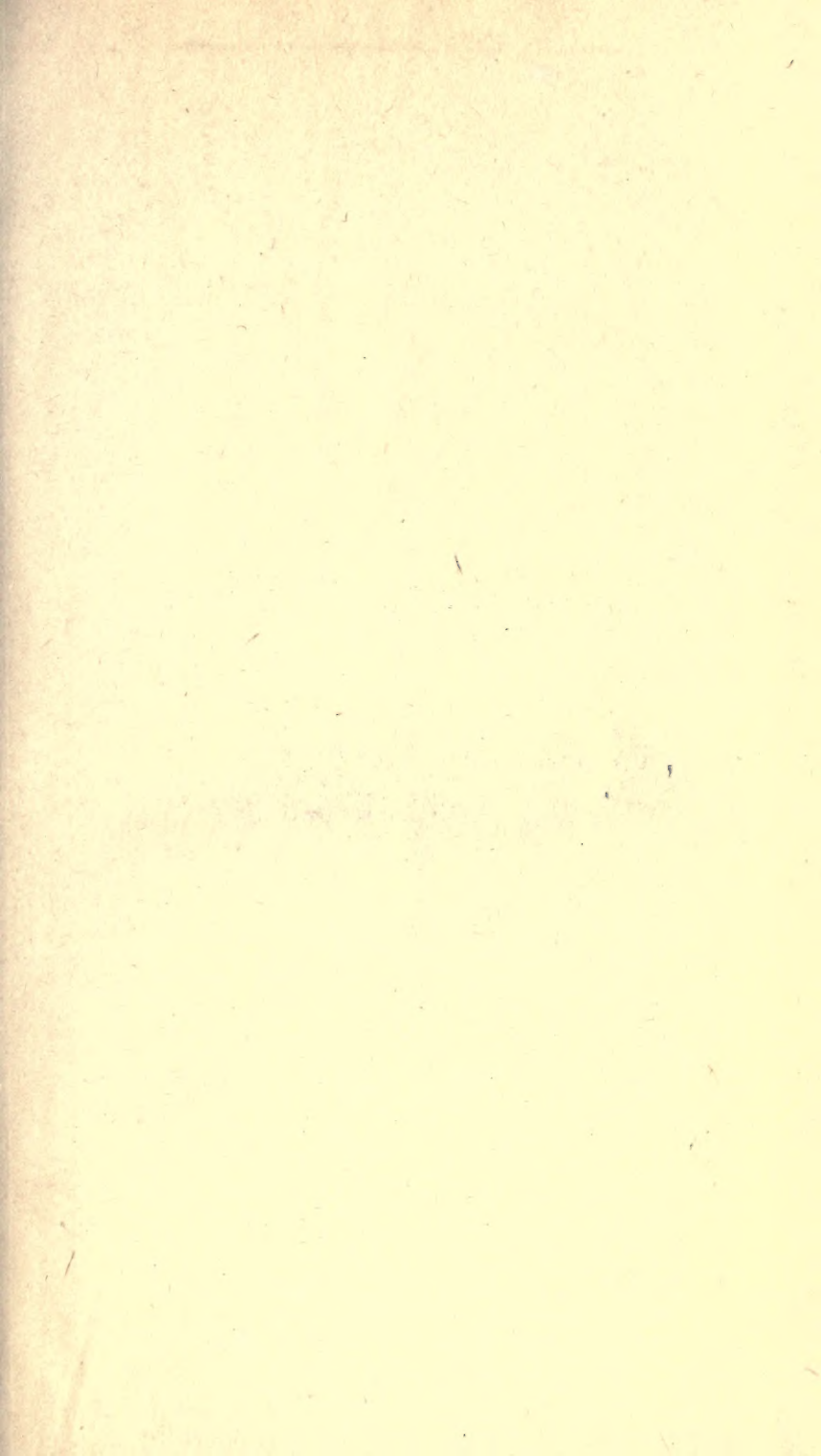




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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

# COURT OF APPEALS

OF

MARYLAND.

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BY RICHARD W. GILL, *Attorney at Law,*

AND

JOHN JOHNSON, *Clerk of the Court of Appeals.*

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VOL. V.

CONTAINING CASES IN 1832-33.

HERRICK & ALLEN

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## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.  
Hon. RICHARD TILGHMAN EARLE, Judge.  
Hon. WILLIAM BOND MARTIN, do  
Hon. JOHN STEPHEN, do  
Hon. STEVENSON ARCHER, do  
Hon. THOMAS BEALE DORSEY, do

### OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

### OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's Counties.*

Hon. JOHN STEPHEN, Chief Judge.  
Hon. EDMUND KEY, Associate Judge.  
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. RICHARD TILGHMAN EARLE, Chief Judge.  
Hon. JOHN B. ECCLESTON, Associate Judge.  
Hon. PHILEMON B. HOPPER, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

Hon. THOMAS BEALE DORSEY, Chief Judge.  
Hon. CHARLES J. KILGOUR, Associate Judge.  
Hon. THOMAS H. WILKINSON, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.  
Hon. ARA SPENCE, Associate Judge.  
Hon. WILLIAM TINGLE, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

Hon. JOHN BUCHANAN, Chief Judge.  
Hon. ABRAHAM SHRIVER, Associate Judge.  
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

Hon. STEVENSON ARCHER, Chief Judge.  
Hon. RICHARD B. MAGRUDER, Associate Judge.  
Hon. JOHN PURVIANCE, appointed 7th May, 1833, *vice* Hon. Thomas Kell, resigned.

### OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.  
Hon. ALEXANDER NISBET, Associate Judge.  
Hon. W. G. D. WORTHINGTON, do. appointed 2d February, 1833, *vice* Hon. Wm. McMechen, deceased.

### ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.



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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**MARYLAND.**

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***December Term, 1832.***

**LEE and WIFE, and JORDAN, vs. STONE and McWILLIAMS.**  
***December, 1832.***

Courts of Chancery in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor.

In Chancery, acts done *bona fide*, for the doing of which an order would on application have been passed as a matter of course, shall be regarded in the same light, as if emanating from an order previously obtained for that purpose.

A vendor of land, in equity, seeking to enforce his lien for a balance of purchase money by a re-sale, cannot require the court to tack to his lien, another debt, to the exclusion of a judgment creditor who has a constructive lien upon the same land.

A mortgagor who goes into Chancery to redeem, will not be permitted to do so, but upon payment not only of the mortgaged debt, but of all other debts due from him to the mortgagee.

But if a mortgagee seeks a foreclosure in Chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt, only; and if a subsequent mortgagee, or judgment creditor, files a bill to redeem, he will be permitted to do so, upon the payment of the mortgage debt, alone.

The real estate of I, a deceased insolvent, was sold under a decree for the payment of debts, to B. This sale was regularly confirmed. B not having paid the *entire* purchase money, the land was re-sold, and certain judgment creditors of his, who alleged his death, and that his personal estate was insufficient to pay his debts, claimed the payment of their demand out of the balance in the trustee's hands after satisfaction of the original purchase money. This application was opposed by the heirs at law of

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I, who were minors at the time of the first sale, but whose guardian, (for whom B was security,) had received and wasted a large amount of the first purchase money, and who claimed the balance arising from the second sale in preference to the judgment creditors of B. The Chancellor confirmed the Auditor's accounts, awarding a payment to the judgment creditors, and his decree upon appeal was affirmed.

### APPEAL from the Court of Chancery.

On the 30th of June, 1810, a decree was obtained in this court, for the sale of the real estate of one *Richard Jordan*, deceased, situate in *Saint Mary's* county, for the payment of his debts, upon a bill filed for that purpose, by a certain *Samuel Coombs*; and *James Cook*, since deceased, was appointed a trustee to make the sale. The trustee reported, that he sold said estate to *Jeremiah Booth*, on the 24th of the then following September, which report was duly ratified and confirmed.

After various subsequent proceedings had in the premises, a petition was filed by the appellees, *Joseph Stone* and *Alexander McWilliams*, on the 19th of March, 1828, in which it was alleged, that the petitioners, at August term of *Saint Mary's* County Court in the year 1822, recovered a judgment against *Booth*, the purchaser, since deceased, and one *James Walker*, (now insolvent) for a large sum of money, which judgment was affirmed by the Court of Appeals at June term, 1825. That *Booth* not having paid the whole purchase money in his life time, the property so by him purchased, was re-sold by an order of this court for the purpose of paying the balance due to the estate of *Jordan*. That *Booth* died without leaving personal property adequate to the payment of his debts, and the petitioners insist, that in virtue of their judgment they have an equitable lien on his interest in the aforesaid land, and upon the balance of the purchase money arising therefrom; and they pray that it may be so applied.

Afterwards, on the 20th of March, 1828. the appellants, *Richard H. Lee* and *Ann* his wife, (formerly *Ann Jordan*), and *Richard Jordan*, the said *Ann* and *Richard* being the

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children and heirs of *Richard Jordan* deceased, filed their petition, in which, after stating in substance the facts contained in the previous petition, they say, that the re-sale spoken of above, was made upon an agreement between them and the heirs of *Booth*, the purchaser, dated June 21st, 1826, by the terms of which, said sale was made for the payment of the balance ascertained by the auditor's report, to have been due the estate of *Richard Jordan*, of \$2018.93, with interest from the 19th of February, 1825; as also for the payment of such other sum as should appear to be due from the estate of the said *Booth*, to the heirs of *Jordan*; provided, that in relation to such latter sum, there should be no other claims against *Booth's* estate entitled to a preference. That at the period of the first sale, under the original decree, the petitioners, *Ann* and *Richard*, were minors, and that one *Edmund Key* was their guardian, and that *Booth* was one of the securities in his bond as such. That whilst acting in that character, their said guardian received at sundry times on account of said petitioners, from the trustee who made the sale, and from *Booth* the purchaser, and under the order of this court, out of the proceeds of and on account of said sale, the sum of \$3972.07, of which sum your petitioners have received together only the sum of \$555.25; and consequently, the whole difference with the interest is now due them, and they contend that the same constitutes a lien upon the proceeds of sale, made by the trustee who re-sold the property, or that at all events, they are in respect of such sum, entitled to participate equally with all other creditors. That *Key*, the former guardian is utterly insolvent, and has been discharged as such.

The agreement of the 21st of June, 1826, referred to in the above petition, states, that, "It is agreed, that the account and report filed by the auditor on the 19th of June, 1826, be ratified and confirmed, and that the land mentioned in the proceedings be sold by the decree of this court, for the payment of the balance due by the estate of *Jeremiah Booth* to the estate of *Richard Jordan*, to wit: the sum of

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\$2018.93 with interest from the 19th of February, 1825, and costs; and it was further agreed that there should be no appeal on either side, and that if it should be made to appear to the satisfaction of the Chancellor, that there are other moneys due to the heirs of *Richard Jordan* from the estate of the said *Booth*, that then and in that case, the proceeds of the sale shall be applied to the payment thereof, as well as of the before mentioned sum of \$2018.93, provided there are no other claims against the estate of the said *Jeremiah Booth* entitled to a preference."

The account stated by the Auditor, which in pursuance of this agreement was ratified by the Chancellor, is an account between *Booth*, the deceased purchaser, and the estate of *Jordan*; and in which, after charging him with the purchase money for the land, and crediting him with various payments to *Edmund Key* and others, made on account thereof, there appeared a balance against him due the heirs of *Jordan* of \$2018.93, with interest from 19th of February, 1825.

For this sum the Chancellor on the 21st of March, 1827, decreed the land to be sold, unless the same should be paid to the heirs of *Jordan*, and the same was accordingly sold by a trustee appointed for that purpose, as stated in the preceding petition, for the sum of \$6958.75.

The auditor subsequently stated an account, which, after appropriating so much of the proceeds of this last sale as was sufficient to pay the appellants, the heirs of *Jordan*, the amount reported to be due them by the report of the 19th of June, 1826, applied the balance as far as it would go towards the payment of the judgment of the appellees, and other judgment creditors, there being evidence of the insolvency of *Walker*, the other judgment debtor; the whole amount of the judgment in favor of the appellees, was charged against the estate of *Booth*.

There was evidence also of the insolvency of *Key*, the guardian,—that *Booth* was one of the securities in his guardian's bond.

Exceptions were filed to this report, but the Chancellor,



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(*Bland*,) on the 7th of February, 1831, overruled the exceptions, ratified the report, and directed the trustee to apply the proceeds accordingly.

From this decree the case was brought by appeal to this court.

The cause was argued before MARTIN, STEPHEN and DORSEY, J.

*Johnson*, for the appellant.

Situated as this fund is, the judgment creditors are not entitled to the exclusion of other creditors. The equity of the present appellants to be paid the whole of their claim, or at least to participate with the judgment creditors, cannot be successfully disputed. The money which they seek to have refunded them, was improperly paid to, and misapplied by *Key*, the guardian, for whom *Booth* was a surety. If *Booth* had lived, there can be no doubt that he would have been responsible for the money wasted by *Key*; and it is not perceived how his death can prevent those to whom his principal is indebted, from coming in for at least a *pro rata* share of his estate.

*Scott*, for the appellees.

There is but one question in this cause, and that is, have the appellants, or the appellees, or either of them, a lien upon the fund subject to distribution?

The appellants claim a lien upon the ground that their claim is for the balance of the purchase money, or against *Booth* as the security of *Key*, who was their guardian, and is insolvent.

Their claim consists of the following items:

- 1st. \$219      given up by the trustee, *Cook*, out of his commissions.
2.    \$1000      paid *Key* by *Booth* on 15th Mar., 1813.
3.    \$115        paid *Key* by *Booth*    15th Aug. 1814.
4.     \$11        paid *Key* by *Booth*    14th Jan. 1817.
5.    \$430 66      paid *Key* by *Cook*, the trustee, 13th January, 1819.

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The first item cannot be pretended to have been a part of the purchase money: it was a donation by *Cook* to *Anna Jordan*, now *Lee*, and *Richard Jordan*, of a part of his commission.

The fourth item was a payment by *Cook* himself to *Key*.

As to the 2d, 3d and 4th items, although there is no positive proof, that those payments were made by the direction of *Cook*, yet the conclusion is strong, almost irresistible, that they were made with his concurrence. We find that *Booth* made other payments which are not contested, and the debts being, as was then supposed, all paid, *Key*, as the guardian, was entitled to receive the balance. The proceedings in this cause go to show also, that it was the understanding of the parties that those payments were properly applied to the credit of *Booth* for the balance of the purchase money. *Anna Jordan* was of age as far back as 1819. This is ascertained by payments made to her by *Cook* himself on 13th February, 1819. *Booth* died in 1824, and *Anna Jordan* first filed her petition for a re-sale on the 5th July, 1825, and *Anna Jordan* and *Richard Jordan* filed their second petition on 3d January, 1826. To that petition *Llewellyn* and wife, the heir of *Booth*, filed their answer and exhibits in February, 1826, showing the payments before mentioned by *Booth* to *Key*, and they charge that those payments were made by the consent of the trustee.

The case was referred to the auditor, and on the 19th of June, 1826, he reported a balance due by *Booth* to the heirs of *Jordan*, of \$2018.93, and no more, giving to the representatives of *Booth* credits for the said payments to *Key*. On 21st of June, 1826, an agreement was filed assenting to this statement, and on 21st of March, 1827, this account was ratified by the Chancellor. Here then was an ascertainment by consent of parties of the balance due by the heirs of *Booth* to the heirs of *Jordan*, and no exception was taken within nine months to the ratification of this report, and it is now too late. The heirs of *Jordan* are estopped, as well by their own concurrence, as by the lapse

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of time, from saying that the credit and statement of 19th June, 1826, does not show the true balance due to them from *Booth*, as the purchaser of the real estate of their father.

Besides, the agreement of 21st June, 1826, shows an unequivocal abandonment on the part of the appellants to all claim of lien on the land, and if under that agreement the heirs of *Booth* had paid the balance therein mentioned, viz: \$2018.93, they would have been immediately entitled to a fee simple interest in the land, subject nevertheless to the claims of *Booth's* creditors, according to their respective rights. All the rights of *Booth's* heirs being subject to his creditors, those creditors have the same rights which his heirs would have had if there had been no creditors. The balance of \$2018.93 has been paid, and the lien is gone.

Suppose *Booth* had sold his equitable estate in those lands, and his assignee, instead of his heir, had paid the balance so ascertained as aforesaid, would he not have been entitled to a fee simple in the land, or could the heirs of *Jordan*, after such acquiescence, have claimed a lien upon those lands for the money so paid to *Key*? If they could not, are they in any better situation when this fund is claimed by a judgment creditor?

It is said, however, that the appellees rely upon "*res inter alios acta*." The counsel for the appellees dissent from the application of this maxim to the case now under consideration, and only contend that the appellants shall be bound by their own act. In this view of the case, the appellants have no lien as for a balance of the purchase money, and they must resort to their claim against *Booth* as the security of *Key*, and must show a lien upon that ground. *Key* was the guardian of *Anna Jordan* and *Richard Jordan*, and as such, he was entitled to receive the balance of the purchase money which remained after the payment of *Jordan's* debts, and on application, the Chancellor would have passed an order directing such payment, and

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upon the payment of such balance the purchaser would have been entitled to a decree. From all that appears, no such order ever was passed: but it is a well established rule in equity, that if a party does that without an order which he would be required to do, that he is entitled to the same benefit as if it had been done under an order. In this view of the case then, if *Booth* had not been the security of *Key*, the parties would have had no lien. Does the fact then of his being the security make any difference? It appears to me that it does not: it is contrary to the policy of the law to extend the doctrine of lien, and this application of it would be pushing the doctrine beyond any thing decided in the cases to which the court has been referred, would warrant.

Indeed, so far from establishing a lien, it may well be doubted whether the appellants have shown themselves entitled to be considered as creditors of *Booth* for the defalcations of *Key*. Their claim is founded upon a bond with a collateral condition; neither the bond, nor a copy of it, is produced. There must have been other co-obligors. It is not shown whether they are living, nor what are their circumstances, or whether any proceedings have been had against them. To entitle the parties to proceed against the estate of the deceased obligor, they should first have shown that they had used due diligence against the surviving obligors, and without success, and this they have failed to do. *Anna Jordan* was of age in 1819, and it is not until 1825, that any efforts are made to recover *this* money. Indeed I might say until 1829. It is to be presumed that *Richard Jordan* also became of age either before, or shortly after his sister, for we find him too receiving money, and during all this time nothing is said about *Booth's* liability as the security for *Key*. *Key* has not been called upon to settle his account in the Orphans Court, this too should have been done, for although he was insolvent in 1829, it does not appear that he was insolvent when the appellants, his wards, became of age. There is then nothing in this



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case to make it an object of peculiar care to a Court of Equity. It is merely a legal demand against a security, and such claims are not entitled to favor either in a court of law or equity. In this view of the case then, the appellants have no lien upon the fund, either for a balance of the purchase money, or against *Booth* as the security of *Key*, and it remains to be considered, whether the appellees have shown themselves creditors of *Booth*, and entitled to a lien.

Their claim is founded upon a judgment rendered in *St. Mary's* County Court, at *August* term, 1822, and it is not denied that they are creditors. Their claim is more than the amount of the whole fund, and it is contended that they have a lien upon it, and the appellants rely upon the acts of 1785, *ch.* 80, *sec.* 7, and 1798, *ch.* 101, *sub-ch.* 8, *sec.* 17. This fund is either realty or personalty, take it either way; the appellants are entitled to be paid before all other creditors, except those having a lien upon the fund, or elder judgments. There are none such.

The only question then is upon the mistake in the statement of the auditor. This is conceded; but if the appellants are entitled to a preference, it is of no consequence, as their claim is larger than the whole balance.

It follows of course, in this view of the subject, that the order of the Chancellor, giving the balance of the purchase money, in the hands of the trustee, to the appellees, should be affirmed, and the appeal dismissed with costs.

*Mayer* in reply.

The question here is not whether the judgment of the appellees was a lien on *Booth's* interest in the land, because, whether a lien or not, the judgment could only bind that interest *subject to all the equities* which bound *Booth* in respect of it toward the appellants, and which involved that interest. That a judgment takes the subject of its lien, subject to all the equities of the debtor, will not, we presume, be denied. *Burgh vs. Francis*, 3 *Bac.*

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*Abr.* 643. 1 *Eq. Ca.* *Abr.* 320. 321. *Finch vs. Earl of Winchelsea*, 1 *P. Wms.* 279. *Brace vs. Duchess of Marlborough*, 2 *P. Wms.* 491. *Finch's R.* 28. *Taylor vs. Wheeler*, 2 *Vern.* 564. *Pye vs. Danbuz*, 3 *Bro. C. C.* 595. *Taylor vs. Wheeler*, 2. *Salk.* 449. *Ex'r. of Polony & Read vs. Keenan and others*, 3 *Dessauss*, 74. *Read vs. Adm'r. of Simmons*, 2 *Dessauss*, 552. If such be the law, then the question recurs, what were the equities of the appellants in regard to *Booth's* interest in the land and its ultimate proceeds? The rule of *Chancery* is, that where equities are equal, the legal estate connected with one of them shall make it predominant. The legal estate is to be regarded as in these appellants, the heirs of *Jordan*, although a trustee be appointed to represent and transfer their interest. With this legal estate, have they not an equity at least equal to that of the appellants? Will it not be deemed superior when it is considered that the purchaser, *Booth*, is identified as surety with the guardian, *Key*, who received without accounting for it, so large a sum of the money as of the purchase money, and from *Booth*, the purchaser himself;—*Booth* being, too, a contractor for the legal estate of the appellants, and in all cases where that estate is to pass from them, whether for *Booth's* benefit, or for those who claim under or against him, being virtually claimant of equity against the appellants, in his own person or that of his heirs, and whether made plaintiff or defendant? On the other hand, a judgment creditor, to use *Lord Eldon's* words, *ex-parte Knott*, 11 *Ves. J.* 617, has neither *jus in re*, nor, *ad rem*, as to land on which he may have even a lien—and gets no estate in the land. *Brace vs. Duchess of Marlboro'*, 2 *P. Wms.* 491. *Anonymous*, 2 *Ves.* 662. *Pre. Ch.* 310.

It might, if necessary, be successfully contended, that the judgment was no lien here at all on the interest of *Booth*, such as it was, in the land. That was a merely equitable interest, and at the very time of the rendition of the judgment, liable to be sold to pay the balance of pur-

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chase money, *Booth* being then already in default, and his interest thus being at that period, to say the most for it, in the condition of a forfeited mortgage of an equitable estate. Such an interest, and in such a plight *Chancellor Kent* designates in *Bogart vs. Perry*, 1 *John. C. R.* 56, a mere *chose in action*, and holds not to be the object of lien, although in *New York* it has been decided that equitable estates in possession may be sold under execution. Our act of Assembly only declares that equitable interests in land may be sold under execution. The *Stat. 29 Car. 2 c. 3. s. 10*, says as much in subjecting to execution the lands of debtors held in trust for them; and yet under that statute, judgments are held to be no liens on the interests it mentions. 2 *Pow. Mort.* 606, 607, 608. *United States vs. Morrison*, 4 *Pets. Sup. C. R.* 137, which considers a judgment lien on realty as incidental only to a right to an *Elegit*, which does not attach to an equitable estate.

Leaving, however, the point of lien,—because the appellees' reliance on that, is a *petitio principii*, and its discussion therefore unimportant,—we return to the relative predicaments, legal and equitable, of the parties. And here, so far as *legal* liability and pretension is concerned, let it be borne in mind that in the case of the appellees, the debt on the joint judgment against *Booth* and *Walker*, by *Booth's* death, survived *at law* against *Walker*, and that they can come here (after proof of insolvency) upon *equitable* merits alone, and armed with no *legal* preference or claim against the fund. Their judgment, *quâ* judgment, is unimportant, and figures only as another more solemn *form of evidence* for their demand. Looking to the question of equities, we find the appellants clothed with the legal estate, and with an equity at least equal to that of the appellees. Having this ascendancy, the appellants may *retain their hold of the legal estate* until all their claims shall be paid, especially where the supervening claim, as this against *Key*, is so *connected* with the principal claim, *and arose*, as the accounts will show, as to the

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greater part of it, *nine years, and as to the rest, five and three years, before the judgment was rendered in the County Court for the appellees.* The advance to Key for which he is in default was \$1,000 on 15th of March, 1813—\$115 on the 15th August, 1814—\$11 on 14th January, 1817—\$430.66 on 13th February, 1819—the judgment was rendered at August term, 1822, of *Saint Mary's County Court*, and affirmed by the Court of Appeals at June term, 1825. The preference which the legal estate assures to a claimant for his original demand, secured expressly by the estate, and also for claims for further sums furnished, especially where they are *antecedent*, as here, to the opposing incumbrance, is well established. Payments and disbursements by the holder for the time of a legal estate will be thus covered and secured by the estate, although the conveyance of the estate to the party be set aside as inequitable. *James vs. Johnson*, 6 *John. C. R.* 429. *Brinkerhoff vs. Marvin*, 5 *John. C. R.* 320, 326. *Hendricks vs. Robinson*, 2 *John. C. R.* 309. *Jarvis' Adm'r. vs. Rogers*, 15 *Mass. R.* 389. *Harding vs. Wheating*, 2 *Mason's R.* 378. And the principle of this superinduced security is independent of any fact of advance being made, or debt contracted expressly or impliedly on the faith of the legal estate. The right of thus retaining the legal estate for payment of subsequent claims, has been carried so far as to make them over-reach even *mesne* incumbrances by mortgage, and although the additional moneys were not pretended to be advanced on the security of the legal estate. *Hedworth vs. Primate*, *Hardr.* 318. *Smithson vs. Thomson*, 1 *Atk.* 520. And such indeed is the operation in the familiar case of a *puisne* mortgagee buying in an *elder* mortgage, and, having so secured to himself the legal estate, gaining a preferred payment of not only his elder mortgage, but also of his younger mortgage over intervening senior mortgages. *D'Arcy vs. Hall*, 1 *Vern.* 49. 1 *Ch. Ca.* 119. 2 *Ch. Ca.* 20. It is not pretended that a bond or simple contract creditor, purchasing, after his debt is contracted an elder mortgage prior in date



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to the debt, can hold out intervening mortgages between his debt and the elder mortgage, until his debt shall be satisfied, just as little as a *subsequent judgment creditor*, as here, can effect that, as is decided in *Pre. Ch. 313. 2 Ch. Rep. 16. Rob. Frad. Com. 355. 1 Eq. Ca. Ab'r. 323.* But where the legal estate is originally held, and *then* advances are made by, or debts contracted with the holder of the security in the legal estate, such liabilities, if *antecedent*, especially, to the judgment or other incumbrance in question, will be paid as if included in the original security, and are within the purview of the legal estate, their vantage ground. The appellees here are in the condition of creditors by subsequent judgment, who having neither *jus in re* nor *ad rem* (and who, it has been decided, are so far from having an *interest in* the land, or a *legal estate in it*, that they may release their right to the land and yet extend it afterwards) cannot gain any advantage for their judgment debts even by purchasing the elder mortgage; or in other words, the legal estate, which in this case we hold; as the adjudications cited by us will show. It is otherwise, where the judgment is older than the mortgage, and the judgment creditor purchases the mortgage. There he will hold out an *intervening* judgment creditor until satisfaction both of judgment and mortgage, notwithstanding the prior date of that intervening judgment to the mortgage. And this can only be because the mortgage gives the legal estate, the judgment giving no interest in the land. Just so is the case of these appellants, who on a long antecedent claim had the power of selling the property as effectually as it existed under the supposed judgment, and who also have the *legal estate* vested in them; who had right to a decree for sale for a default occurring even long before the judgment in question in this case was rendered, and whose additional claim existed before rendition of the judgment. *Smithson vs. Thomson, 1 Atk. 520.* It will not be denied that the appellants with their claim for the purchase money, stand virtually as mortgagees of the land.



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We come then to the conclusion, that our claim for the money paid by *Booth*, the surety to *Key*, his principal, is secured to us in preference over the appellees, by the simple force of the principle, that where equities are equal, that which is attended by the legal estate shall be embraced by that estate and be predominant. But is there not a superior equity in the appellants to that of the appellees? *Booth* was surety for *Key's* due application of the funds received by him as guardian. He was thus identified with him in responsibility; and for any amount in which *Key* proved delinquent, *Booth* was *constructively* a co-operator with him in the breach of trust.

Suppose that *Booth*, instead of being surety for *Key*, the guardian, had been surety for *Cooke*, the trustee, on his trustee bond, and had paid money to *Cooke* on the purchase which *Cooke* had not accounted for? Would such payment have been allowed to *Booth* as purchaser, upon an application by the appellants for re-sale of the property to pay any balance of the purchase money? It would scarcely be pretended. Such an allowance, for misapplied purchase moneys paid, would not be made to a purchaser in *England*, although not a surety for the trustee. *Lloyd vs. Baldwin*, 1 Ves. 173. *Booth* stands in the relation of a purchaser, bound to see to the application of the purchase money so far as concerns the payments to *Key* the guardian, which he ventured to make to him. The appellants were at that period the only persons for whom the trust in relation to the purchase money existed. The case then is precisely like that of a trust for payment of a certain claim in which it is undisputed that the purchaser is bound to see to the application of the purchase money; and it is the more like such case, as the purchaser here has undertaken to make payment to the guardian of those who at the time were in fact entitled to the fund. *Abbott vs. Gibbs*, 1 Eq. Ab. 358. *Sugden's Vend. & Pur.* 331. 332. 333. *Dunch vs. Kent*, 1 Vern. 260. *Spalding vs. Shalmer, et al.*, *Ib.* 301. So especially where the money belongs to an infant, payable to

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him personally at his majority. *Dickinson vs. Dickinson*, 3 Bro. C. C. 19. And payments to an executor in account by a purchaser, are not allowed where the purchaser has notice of an outstanding debt of the testator. *Crane vs. Drake*, 2 Vern. 616, in which case there is no express contract, as here, identifying the parties in effect in duty and liability. So where there is a breach of trust known to the purchaser, committed in relation to the trust fund, the purchaser having paid the fund must still stand liable. *Watkins vs. Cheek*, 2 Simon and Stew. 199. What difference is there between a breach of trust known to a party or connived at by him, and one for which, known or unknown, the party is answerable, as a surety of a guardian is answerable for the guardian's misfeasances. The purchaser, too, is bound to see to the application of purchase money of land sold, under act of Parliament for a particular purpose. *Cotterel vs. Hampson, et al.* 2 Vern. 5. So connected in fact is the purchaser with the rights of those who are entitled to the benefit of the purchase money, that equity views him as a trustee for them in relation to the purchase money. *Sug. Vend.* 120. ch. 4. It seems clear then, that (independent of the consideration of the absence of all order of the court to authorise the payment) the purchaser, *Booth*, being at the same time a surety of *Key*, the guardian, was bound to see to the application of the purchase money he paid to *Key*, within the chancery rule as to purchasers in certain cases; and that though the payments might by the appellants be allowed in the account of the purchase money, as between *Booth* and the trustee, yet as between him and the heirs, they cannot avail effectively as payments; or, in other words, can avail only conditionally, that is, if duly applied by *Key*. To avoid circuitry, therefore, and in view of the comparative equities of these contending parties, they may be considered as no payments. And we contend, at all events, that the equity of the appellants is as to these amounts enhanced by the duty of *Booth* to see to their application; and that in regard to them, therefore, the appel-

lants enjoy an equity superior to that which attaches to the claim of the appellees. This view steers clear of any opening, as it might possibly be deemed, of the agreement of 21st June, 1826, on which the decree for re-sale was passed—open as is that agreement in the controversy between *these* litigants. But that agreement, made between *other parties* and to regulate *another account*,—*the account between trustee and purchaser*,—is no bar to an examination of *the nature and character* of any of the credits there introduced, when that examination is made for estimating the equities, or otherwise adjudging the claims of *other parties since* brought into the cause. The very agreement too, provides for the payment of *all other claims* of the appellants, beside that for the balance of the account of *purchase money*, to be prevented only by claims commanding a preference over such other claims. The very agreement, then, in effect, *reserves the rights* of the appellants as to the items of payments to *Key*, which are introduced into the purchase money account referred to,—because there are no *further claims* of the appellants, than that arising *on those items*. It is *this question of that preference* in regard to those additional claims, that we now are investigating; and now if on this question that account which is the subject of the agreement be used by appellants or appellees, it must be used with due regard to all the circumstances attending the payments allowed; in other words, with due regard to the *legal and equitable character* of those different items of payment, and according to their intrinsic merits. *It is that very character and those merits* which we have been endeavoring to exhibit. It is, therefore, begging the question to contend, that the agreement bars our pretension to bring the present claim under the original security, by showing that the amount of it never was in legal effect paid by the purchaser as against us; especially as that claim is looked to as one of the objects of the sale decreed, and for the application of the proceeds. It might as well be said that an agreement is to be an estoppel without

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its contents being ascertained by the court, as to contend, as virtually is done here, that the items of the account, which is the subject of the agreement, are not to have effect according to their legal and equitable operation in reference to the parties respectively and variously concerned. Now it is plain, that in the account as between purchaser and trustee, the legal and equitable operation of the payments to *Key* might be, or be admitted so to be, to introduce them as credits in that account, and yet as to ulterior parties and contending claimants of an amount *beyond the balance of the account*, which is the present state of things, these items might not avail as payments. It is so far *res inter alios acta*. We have therefore a right to canvass the items of the account, and show that certain items are not, as between these parties, to be allowed *Booth* as payments to reduce his debt for the purchase. But, at all events, to recur to the other aspect in which we reviewed the particulars of those items, we may make the examination to show the superiority of our equity over our opponents.

The explanation we have given of the agreement, would answer the objection drawn from the fact of the agreement, to our disputing those items as payments, in consequence of the sums not being ordered by the Chancellor to be paid to the guardian. In this point of the absence of an order, there appears to us much force; because even granting that the Chancellor would have ordered the payment if he had been applied to, yet under the general powers of the court, confirmed too by act of Assembly, he might also have ordered the investment of the money by the guardian for the benefit of the infants, instead of an unconditional payment over to him.

2. The utmost, it seems to us, that the appellees in any view could aspire to, would be to have payment *pari passu* with our demands, as in a case, where there being no acknowledged legal estate, (as there is here,) on which to engraft the claim, a fund, by virtue of the general authority of the court, in protection of creditors, comes under the



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control of a Court of Chancery. *Codwise vs. Gelston*, 10 *John. R.* 507. *Riggs vs. Murray*, 2 *John. C. R.* 576. Our claim, however, and the origin of the fund now required to answer it, are such, that the principles referred to, of a *pari passu* payment, do not apply.

The idea urged by the appellees, does not appear tenable, that because an executor or administrator, under our testamentary act of 1798, *ch.* 101, is required to pay judgments as preferred debts out of the personal estate, therefore they must be so paid out of *any fund*, no matter what its origin, nor whether the case be or be not an administration of an estate, wherever there happens to be a *death* of a debtor; and although by that death, as here, the *legal liability* survives against the other joint debtor. The surviving of the liability would prevent the administrator or executor even from paying the judgment as a preferred debt in course of administration; and the creditors would have to resort even there to equity. However, the view of the act of 1798, *ch.* 101, it would seem, cannot be sustained on this occasion, unless it be sufficient for premises to contain one term that is found in other premises, to lead to that conclusion in which those other premises result.

3. With regard to the errors of amount, they are too obvious to require argument. The auditor, in his charges against the appellants of payments from *Key*, not taking the whole of the statements of their petition, singles out the admission there of a payment of \$555.25, and inserts it in his account as a new payment over and above those already credited to *Key*. On examination it will be found to be the aggregate of amounts already credited.

4. The other error was in omitting the credit to the appellants for the payment by *Mr. Cooke*, the trustee, to *Mr. Key*, for the benefit of the appellants, of \$219, given up from the trustee's commissions, and for which the guardian, *Key*, and therefore *Booth*, was responsible.



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5. In conclusion, we would suggest, that this is, in regard to the appellants, the case of claims accrued to them while infants—of equities originating at a period of infancy. The very character of infants at that period, to which the comparison of equities must look back, would, according to all decisions, give superiority to the equity of the appellants, and entitle them to prevail even if uninvested with the legal estate which now fortifies them. *Drury vs. Conner*, 1 *Harr. & Gill*, 230.

DORSEY, J. delivered the opinion of the court.

Among the numerous grounds upon which the decree of the Chancellor is attempted to be reversed, the appellants have urged one, which, if sustainable, would remove all motive for further litigation on the various questions which have been discussed in the progress of the cause. It has been contended, that *Booth's* interest in the land sold, being a mere equitable estate, a judgment at law against him would create no lien upon it, that, in a Court of Equity, would give it a preference over the claims of his creditors generally. This position we cannot sanction. Courts of Chancery in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor. 1 *Pow. Mortg. (Coven. Ed.)* 263, 4, 276, 281, 2, 307, and 2 *Ib.* 607, 8.

The appellants have also insisted upon another principle, which if established would be equally conclusive on the matters in controversy; and that is, that the payments to *Edmund Key*, the guardian, having been made without the previous sanction of the Court of Chancery, were made by *Booth* in his own wrong, and ought not to be carried to his credit in ascertaining the balance of the purchase money due to the heirs of *Jordan*. To support a doctrine fraught with so much hardship and injustice, no unbending rule of law, or equity, has been adduced. We know of

none that could sustain it; and think the credits properly allowed, upon the established rule in chancery, that acts done *bona fide* without an order, for the doing of which, an order would on application have been passed as a matter of course, shall be regarded in the same light as if emanating from an order previously obtained for that purpose. But suppose it were otherwise, and that this objection if taken in due season were well founded. The appellants have precluded themselves from all benefit which they might otherwise have derived from it, by their agreement of the 21st of June, 1826, and by the Chancellor's order under that agreement, ratifying the auditor's statement, from which ratification no appeal was taken within the time prescribed by the act of Assembly.

By this order of the Chancellor, all the payments were confirmed as credits to be deducted from the balance of the purchase money then due by *Booth's* estate; and if there were errors in it, the time has elapsed within which their correction must have been sought. But there was no such error. Even if the ground first assumed to maintain the auditor's statement were untenable, the agreement of the parties is ample for that purpose. Upon no principle of fair construction, can the appellants' interpretation of it be supported. They seek to evade the conclusiveness of the Chancellor's order, from its not having been appealed from within the limited time, and to open to scrutiny and revision, the items in the auditor's statement, by that part of the agreement which states, that "it is further agreed, that if a sale should be made under this agreement, if it should be made appear to the satisfaction of the Chancellor, that there are other moneys due to the heirs of *Richard Jordan*, from the estate of the said *Jeremiah Booth*, that then, and in that case, the proceeds of the sale shall be applied to the payment thereof, as well as to the before mentioned sum of \$2018.93, with interest and costs, provided there are no other claims against the estate of the said *Jeremiah Booth*, entitled to a preference or participation in the fund." But

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this part of the agreement was never designed to license a nullification, or impeachment of the auditor's statement, or any part of its contents; but was intended simply to authorise the appellants to increase and secure the payment of the balance due them, by proving claims against the estate of *Booth*, not professed to be adjusted by the audit, manifestly looking to the claim now insisted on against *Booth*, as the security of *Key*, in his guardian's bond.

It has been further contended, that the appellants are to be first paid, as well the balance due them from *Key*, as that which appears on the auditor's account; *Booth*, as the security, being answerable for the defalcations of the guardian;—that the appellants being seized of the legal estate in the land sold, their legal title could not be taken from them until they were paid, not only the remaining balance of the purchase money upon whatever account due from *Booth* to them; and this pretension is rested upon the familiar principles of equity, “that he who seeks equity, must do equity; that a multiplication or circuitry of action should be avoided.”

But these principles have never been carried to the extent, that would be necessary to their affording relief to a party in the predicament of the present appellants. They stand here in the character of complainants seeking to enforce their lien, for a balance of the purchase money, by a sale of the premises on which their lien attaches; and require this court not only to enforce their lien, but to *tack* to it another debt, apart from such their application entitled to no priority over other creditors; and this to the exclusion of another creditor before the court, whose debt is secured by a lien on the premises. If there be any case to warrant this requisition, it has not been presented to our notice in the argument; and has certainly escaped our researches upon the subject. It is true, that if a mortgagor goes into chancery to redeem, upon the axioms of equity above mentioned, he will not be permitted to do so but upon payment, not only of the mortgage debt, but of all other

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debts due from him to the mortgagee. In this there is no prejudice to the rights of others; no body has a right to complain; no injustice is done to any body.

But it is also true, that if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear, that if a subsequent mortgagee, or judgment creditor, file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is, in effect, simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law, to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.

The views we have expressed of the prominent features of this case, render it unnecessary to investigate the auditor's statements, to ascertain whether the alleged error of having twice credited the guardian with the same expenditure of \$555.25, exist or not; as the result of such an investigation could not affect the Chancellor's decree. If there be such error, it would only vary the general balance due to the appellants. It forms no part of the amount secured by their specific lien, and would be postponed until the judgment of the appellees were wholly paid, for which the entire fund in dispute is greatly inadequate.

DECREE AFFIRMED WITH COSTS.



THOMAS vs. CATHERAL.—*December, 1832.*

In an action founded upon the special guaranty of a promissory note, brought by the payee of the note against the guarantor, the wife of the maker of the note is not a competent witness to prove the note void for usury in its origin, without a sufficient release.

Where a witness was properly rejected by the County Court as incompetent without a release, and a release executed and tendered at the bar, objected to as insufficient, was held sufficient, and the witness admitted to testify, this court upon appeal reversed the judgment, because the release did not appear in the record, and therefore, they could not hold that the first objection had been removed.

Usury is a question of fact for the determination of a jury. A note made and endorsed in execution of a previous usurious agreement is tainted with usury.

APPEAL from *Baltimore County Court.*

This was an action of *Assumpsit*. The declaration contained three counts, upon a guaranty by *Catheral*, the appellee, upon the note set out in the evidence, in conformity with the endorsement thereon. The defendant pleaded *non assumpsit*, and issue was joined.

1. The plaintiff, at the trial, proved the following promissory note:—" \$110. Twelve months after date I promise to pay *Mary Thomas*, one hundred and ten dollars, for value received. *Baltimore*, October 22d, 1820. *John Gorham*." He also proved the following endorsement, and signature on the back thereof. "For value received, I undertake and promise to guaranty the payment of the money within mentioned, to the within named *Mary Thomas*.—*Wm. Catheral*."

The signature or endorsement was admitted to be in the defendant's hand writing; and that the special guaranty there above written, was written by the plaintiff's counsel after said endorsement, and after the note had been placed in the hands of the plaintiff's counsel to bring suit thereon, and before suit was brought. The defendant then produced as a witness *Sarah Gorham*, the wife of the drawer of the



said note, by whom he proposed to prove, that she was sent by her said husband for the purpose of effecting the loan, to secure which the said note was given, and that she did effect the same with the plaintiff for her husband, for twelve months, at the rate of 10 per cent. *per annum*. That the plaintiff agreed to loan \$100 at that rate, and to take a note for twelve months, with security therefor, for \$110, and that witness had, upon such contract, received the \$100 of the plaintiff, who deducted from that amount a small bill, and paid her the balance. To the competency of which witness the plaintiff objected. And the court, (*Hanson, A. J.*) sustained the objection, and rejected the witness. The defendant then, in the further progress of the cause, executed to *John Gorham*, and delivered to the said *Sarah Gorham*, a release, (which release, however, formed no part of the record transmitted to this court.) The plaintiff still objected to the competency of the witness, because the release could not operate upon the costs alone, which might be recovered against the defendant; and because the paper was not tendered to, or accepted by the releasee, or by any agent authorised by him to accept the same. But the court overruled the objection, and was of opinion that the witness was competent to prove the matters for which she was offered. The plaintiff excepted.

2. The defendant further offered in evidence by the said *Sarah Gorham*, that in the year of 1820, and she believes in the month of September or October of that year, by the direction of her husband, *John Gorham*, she called upon the plaintiff to effect for him a loan of \$100; that the plaintiff agreed to loan that sum to the said *John Gorham*, provided he would pay her ten dollars for the use of the said sum for one year, and would give a note, with good security, for the amount of such principal and interest; that is to say, a note with good security for \$110. The witness was directed by the plaintiff to tell her husband that he could have the money on the terms as stated. That the witness

went back and told him what the plaintiff had said to her, and he immediately went out of the house. That the morning after this conversation and agreement, the witness received for her husband from the plaintiff, and delivered to him, a part of \$100, the precise amount she does not remember. That on the day after she had so received the said part, she also received the balance of \$100, from the plaintiff, who had deducted from such balance a small bill due the plaintiff by her husband. The whole amount received by the witness from the plaintiff, including the bill aforesaid, was \$100. The witness had no knowledge of any money being paid or delivered by the plaintiff to her husband upon the contract, and that she received the money by direction of her husband. The witness further stated, that she had several conversations with the plaintiff after this suit was brought, who called on her about the suit against the defendant. That the plaintiff in such conversations requested her not to state the circumstances in relation to this case, but to try and waiver, as it would injure her the plaintiff; that she ought to waiver and not to state the circumstances, as the money was loaned to her husband. The defendant further offered in evidence by *T. S. Schoolfield*, the subscribing witness, that he witnessed the signing of the said note by *Gorham*, and the endorsement by the defendant, which endorsement was in blank. And also offered evidence by *Captain Mason*, and *Eliza Mason* his wife, that they were present at a conversation between the plaintiff and the witness, *Sarah Gorham*, when the plaintiff desired the said *Sarah* to waive it, and not to tell the circumstance so plain, for she had seen her lawyers, and was satisfied, if she did, she would be cast. The defendant's witness, *Sarah Gorham*, further stated, that she did not see the note, now sued upon, given or endorsed, nor was she present when it was so given or endorsed, nor does she know what occurred between her husband and the plaintiff when the note was given or endorsed by the said *Gorham* to the plaintiff; but the plaintiff stated to the

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witness, that she had received the note for the \$100 from her husband. This conversation was when the money was received. The plaintiff then prayed the opinion of the court, and their direction to the jury:—*First*. That if they believe that the note in question was made and delivered to the plaintiff by *Gorham*, and that the witness, *Mrs. Gorham*, was not present when the said note was delivered, nor does the witness know what consideration was given at the time the note was made, nor does she know whether any subsequent consideration was paid to her husband therefor, or not; nor what consideration passed to the defendant for the guaranty in question, so as to connect the said instrument, and the contract made at the time the note was given, with the previous conversations the day before, between the plaintiff and the witness, that then all such previous conversations ought to be laid out of view by the jury. *Secondly*. That if the jury believe, that there is no evidence before them that any usurious agreement was actually made between *Gorham* and the plaintiff at the time the said note was made and delivered by *Gorham* to the plaintiff, and that no usury was committed between the plaintiff and the defendant on the contract of guarantee, then the plaintiff was entitled to recover, notwithstanding the previous conversations between *Mrs. Gorham* and the plaintiff, respecting a loan for usurious interest. Which directions, and each of them, the court refused to give to the jury. The plaintiff excepted; and the verdict and judgment being against her, she appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

*Johnson*, for the appellant.

There was no argument for the appellee.

BUCHANAN, Ch. J., delivered the opinion of the court.

Without a sufficient release it is superfluous to say, that *Sarah Gorham*, the wife of the maker of the note, was not a competent witness; and the paper stated to have been executed to *Gorham* as a release, and delivered to his wife, upon which she was admitted as a witness, not appearing in the record, we have nothing before us to show, that the objection to her competency was removed, and are therefore constrained to say, that for any thing appearing in the case, her testimony should not have been received.

As to the second exception, whether in point of fact, usury was committed or not, was a question for the jury, upon the whole of the evidence submitted to them; and whether there was an usurious agreement or not, entered into between the parties, at the time of making the note, or of the endorsement on the back of it, by the defendant, yet if the note was made and endorsed, in execution of a previous usurious agreement, it was tainted with usury; and that was a matter proper to be left to the jury. And there being no evidence in the record opposed to that of *Sarah Gorham*, the court did right in refusing both of the prayers contained in that exception, neither of them having any connexion with the question of her competency. But as the court did wrong in admitting her testimony, which formed the subject of the first exception, the judgment must be reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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JARRETT vs. THE STATE, use of STUMP.

S died, leaving E his widow, and an infant son entitled to personal property. The widow refusing to act as guardian, the Orphans Court appointed J, who accepted the trust. During this guardianship E married again. J then died, leaving the son of S still a minor. E, the mother, as natural guardian, with the consent of her second husband, now undertook the guar-



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dianship, and gave bond in that character for the faithful discharge of the trust, with security, in which her second husband united. In an action on this bond brought in the name of the State (the obligee,) for the use of the ward after his arrival at full age. HELD, that the mother was the natural guardian. That the Orphans Court had jurisdiction to accept the bond. That the action could be maintained against a surety without suing the guardian. That an order from the Orphans Court directing the guardian to pay the ward, was not essential to the right of action.

When judgment is rendered upon a demurrer in favor of a plaintiff, an inquiry to assess the damages may be waived by consent, and final judgment will be entered for the sum agreed on by the parties.

**APPEAL** from *Harford* County Court.

*Debt* against the appellant, as one of the sureties in the following bond, entered into by *Elizabeth Jarrett*, (the wife of *Abraham Jarrett*,) as natural guardian to *William Herman Stump*, the equitable plaintiff in the court below, at whose instance and for whose use the action was brought, viz.—“Know all men by these presents, that we, *Elizabeth Jarrett, Abraham Jarrett, Edward Hall, Edward Griffith, William B. Stokes, Isaac Perryman, John Street, Thomas Ayres, Josias W. Dallam, Jesse Jarrett, and Joshua Rutledge*, are held and firmly bound unto the State of *Maryland*, in the full and just sum of fifty thousand dollars, to be paid to the said State, which payment, well and truly to be made and done, we bind ourselves and every of us, our every of our heirs, executors, and administrators, in the whole and for the whole, jointly and severally firmly by these presents, sealed with our seals, and dated this eleventh day of *March*, in the year of our Lord eighteen hundred and seventeen. The condition of the foregoing obligation is such, that if the above bounden *Elizabeth Jarrett*, as natural guardian to *William Herman Stump*, of *Harford* county, shall faithfully account with the Orphans Court of *Harford* county, as directed by law, for the management of the property and estate of the orphan under her care, and shall also deliver up the said property, agreeably to the order of the said court, or the directions of law, and shall in all respects perform the duty of guardian to the



said *William Herman Stump* according to law, then the above obligation shall cease; it shall otherwise remain in full force and virtue in law." Which bond was signed and sealed by the said obligors; and certified by the register of wills of *Harford* county, under the seal of his office to be a true copy taken from the original, &c. The defendant, after craving oyer of the bond, pleaded,

1. General performance of the condition of the said bond by *Elizabeth Jarrett*.

2. That he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he saith, that one *Elizabeth Jarrett*, who is named in the said supposed writing obligatory is the principal in the said writing, and that the defendant is only the security of the said *Elizabeth* in the said supposed writing obligatory. And the defendant further saith, that the said State hath not sued out a writ against the said *Elizabeth*, or commenced any suit or action against her to recover the debt aforesaid in the said supposed writing obligatory mentioned, and that the said *Elizabeth* has heretofore, ever since the date of the said supposed writing obligatory, lived and resided within the county aforesaid, and still does reside in said county, and this, &c.

3. That the said *Elizabeth Jarrett* mentioned in the condition of the said supposed writing obligatory, was not at the time of the making of the said supposed writing obligatory, the natural guardian of the said *William Herman Stump*, nor hath she ever at any time since the making thereof, acted as natural guardian to the said *William Herman Stump*, and this, &c.

4. That the said *Elizabeth Jarrett*, in the condition of the said supposed writing obligatory mentioned, at the time of the making of the said supposed writing obligatory, was the wife of a certain *Abraham Jarrett*, to wit, at *Harford* county, aforesaid, and that the Orphans Court of *Harford* county, by which said court the said supposed writing obligatory was taken, had no power or right to take from the

said *Elizabeth*, she then being the wife of the said *Abraham Jarrett* as aforesaid, the said supposed writing obligatory, wherefore the said supposed writing obligatory is null and void, and this, &c.

5. That the said *Elizabeth Jarrett*, in the condition of the supposed writing obligatory aforesaid mentioned, at the time of the making thereof, and at the time she was supposed to have been the natural guardian of the said *William Herman Stump*, was the wife of *Abraham Jarrett*, and was not discovert at any time during the whole period at which she was supposed to be the natural guardian of the said *William Herman*, and that she, the said *Elizabeth*, being the wife of the said *Abraham* as aforesaid, at the time of her supposed accepting the guardianship of the said *William Herman* was incapable of accepting of the guardianship of the said *William Herman Stump*, and she being so unable to accept of the said guardianship, the Orphans Court of *Harford* county had no power or jurisdiction to receive her acceptance as guardian as aforesaid, or to consider the said *Elizabeth* as guardian to the said *William Herman*, and this, &c.

6. That long before the making of the said supposed writing obligatory, to wit, on the 28th day of December, in the year 1802, the said *Elizabeth Jarrett* mentioned in the condition of the said supposed writing obligatory, which said *Elizabeth*, at that time, was sole and unmarried, and she the said *Elizabeth* then and there refused to accept of, or undertake, the guardianship of the said *William Herman Stump*, in the condition of the said supposed writing obligatory also mentioned; and the Orphans Court of *Harford* county for the time being, on the said 28th day of December, 1802, did appoint a certain *John Stump* to be guardian of the said *William Herman Stump*, and the said *John Stump* did then and there give bond and security for the faithful performance of his trust as guardian to the said *William Herman*, in manner and form as required by law, and the said *John Stump* did perform the duties of guar-

dian until the time of the said *John Stump's* death, to wit, on the first day of February, in the year 1816; and the defendant further saith, that long before the death of the said *John Stump*, and while he was guardian to the said *William Herman Stump* as aforesaid, to wit, on the first day of May, 1805, the said *Elizabeth*, in the said condition aforesaid mentioned, intermarried with a certain *Abraham Jarrett*, and still is the wife of the said *Abraham Jarrett*, to wit, at the county aforesaid, and while she was covert and the wife of the said *Abraham* as aforesaid, to wit, on the 11th day of March, in the year 1817, she, the said *Elizabeth*, made the supposed acceptance, or undertook the said supposed guardianship of the said *William Herman Stump*, and the said supposed writing obligatory was then and there given for the faithful performance of the said supposed guardianship; and the said defendant saith that the said *Elizabeth* being a married woman as aforesaid, had no power to accept, offer, or undertake a guardianship, and that the Orphans Court aforesaid had no power to appoint the said *Elizabeth* to the said guardianship, and the said Orphan's Court then and there had no power to take from the said *Elizabeth*, she being a married woman as aforesaid, a bond for the faithful performance of the duties of guardian to the said *William Herman*; wherefore her appointment as, or acceptance of guardian to the said *William Herman* was null and void, and the said bond so taken from the said *Elizabeth*, which said bond is the said supposed writing obligatory aforementioned, is also null and void; wherefore, &c.

7. That the Orphans Court of *Harford* county did not at any time before the impetration of the original writ in this case, order or direct the said *Elizabeth Jarrett* in the said condition of the said supposed writing obligatory mentioned to deliver up the property of the said *William Herman Stump*; and this, &c.

8. That the Orphans Court of *Harford* county, hath no power to take any bond or writing obligatory from any na-

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tural guardian for the faithful performance of such guardian's trust, unless some friend of the ward or infant under the care of such guardian make application to the said Orphans Court; and the defendant saith that no person did make any application to the said Orphans Court, and require the said Orphans Court to call on the said *Elizabeth*, in the said writing mentioned, to give bond for the performance of her trust as guardian to the said *William Herman Stump*; and further saith, that the said Orphans Court did take from the said *Elizabeth* the said supposed writing obligatory without any application from any friend of the said *William Herman Stump*; wherefore the said Orphans Court had no power to take any such writing obligatory, and the said supposed writing obligatory so taken as aforesaid, is null and void; wherefore, &c.

9. That the said *Elizabeth*, in the condition of the said supposed writing obligatory mentioned, did deliver up to the said *William Herman Stump*, also therein mentioned, after he attained the age of twenty-one years, all the property of the said *William Herman*; and this, &c.

10. That it does not appear by the records of the Orphans Court of *Harford* county aforesaid, that the said *William Herman Stump* was an infant within the age of twenty-one years at the time the said supposed writing obligatory was made; and because he saith that the said *William Herman* was not an infant within the age of twenty-one years; wherefore he further saith that the said Orphans Court had no power to take a bond for the faithful performance of the said supposed guardianship to the said *William Herman*; and he is, &c.

The plaintiff demurred generally to the *second*, *seventh*, and *eighth* pleas; to which there were joinders in demurrer. The plaintiff replied to the other pleas as follows:

*Replication to the first plea, protesting, &c.*—For replication to the said plea the said State avers, that after the making of the said writing obligatory, the said *Elizabeth*, the natural guardian of the said *William Herman Stump*, to wit,



on the 11th day of March, 1817, and on divers other days and times between that day and the 8th day October, in the year 1821, to wit, at the county aforesaid, had and received for and on account of her said ward, the said *William Herman Stump*, for whose use this suit is instituted, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of twenty thousand dollars; and the said State further avers, that afterwards, and before the impetration of the writ original in this cause, to wit, on the 8th day of October, in the year 1821, the said *William Herman Stump* arrived at the full age of twenty-one years, at the county aforesaid, and was then and there entitled to have and receive of the said *Elizabeth*, as guardian aforesaid, the aforesaid large sum of money, to wit, the sum of twenty thousand dollars, which the said *Elizabeth* had so as aforesaid received; yet the said *Elizabeth*, although often requested so to do, hath not yet paid the same or any part thereof to the said *William Herman Stump*, but hath therein wholly failed and made default, and the said sum of money so had and received by the said *Elizabeth* as guardian aforesaid is wholly unpaid and unsatisfied to the said *William*, contrary to the duty of the said *Elizabeth* as natural guardian aforesaid, and contrary to the effect of the said condition of the said writing obligatory, to wit, at the county aforesaid; and this the said State is ready to verify, &c.

*Replication to the third plea.* That the said *Elizabeth*, long before the execution of the said writing obligatory, to wit, on the 1st day of March, in the year 1800, intermarried with a certain *Herman Stump* of *Harford* county, and by her said husband she the said *Elizabeth* afterwards had issue, the said *William Herman Stump*, to wit, at the county aforesaid; and the said State further avers, that afterwards and before the execution of the said writing obligatory the said *Herman Stump*, the husband of the said *Elizabeth*, departed this life at the county aforesaid, to wit, on the 1st day of March, in the year 1802, leaving the said *William Herman Stump* an infant within the age of twenty-one

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years, to wit, of the age of two years; and the said State further avers, that at the time of the execution of the said writing obligatory, to wit, on the 11th day of March, in the year 1817, the said *William* was an infant within the age of twenty-one years, to wit, of the age of sixteen years, to wit, at the county aforesaid; and the said State further avers, that the said *William Herman Stump* did not arrive at the full age of twenty-one years until long after the execution of the said bond, to wit, until the eighth day of October, in the year 1821. And the said State further avers, that after the making of the said writing obligatory, the said *Elizabeth*, as the natural guardian of the said *William Herman Stump*, &c. ; and here replication assigned a breach as in the replication to the first plea.

*Replication to the fourth plea.* That the said *Elizabeth*, being the natural guardian of the said *William Herman Stump*, and covert of a certain *Abraham Jarrett* at the time of the execution of the said bond mentioned in the said *fourth plea*, did execute the same bond by and with consent of her husband *Abraham Jarrett*, to wit, at the county aforesaid, and after the making of the said bond, the said *Elizabeth*, as natural guardian foresaid, &c ; and this replication assigned a breach as before.

*Replication to the fifth plea.* That the said *Elizabeth*, being the natural guardian of the said *William Herman Stump*, and covert of the said *Abraham Jarrett*, at the time of the execution of the said bond, did on the 11th March, 1817, execute the said bond, by and with the consent of her said husband, *Abraham Jarrett*, to wit, at the county aforesaid ; and the said State further avers, that the said *Elizabeth* did then and there undertake and accept the burthen of the said guardianship, by and with the consent of her said husband, the said *Abraham*, and after the making and execution of the said bond as aforesaid, the said *Elizabeth* as natural guardian aforesaid, on, &c.; assignment of breach as before.

*Replication to the sixth plea.* That the said *Elizabeth*, prior to her marriage with the said *Abraham Jarrett*, to wit, on the first day of March, in the year 1800, was the wife of a certain *Herman Stump*, by whom she had issue the said *William Herman Stump*, to wit, at the county aforesaid; and the said State further avers, that the said *Herman Stump*, the first husband of the said *Elizabeth*, died at the county aforesaid, leaving the same *William Herman Stump* an infant, within the age of twenty-one years, to wit, of the age of two years; and the said State further avers, that afterwards, to wit, on the day and year aforesaid, at the county aforesaid, the said *Elizabeth* intermarried with the said *Abraham*, and that afterwards and before the execution of the said writing obligatory, the said *John Stump*, to whom the guardianship of the said *William Herman Stump* had been granted, as alleged in the said *sixth plea* of the defendant, departed this life, to wit, at the county aforesaid, leaving the said *William Herman Stump* still an infant, within the age of twenty-one years, to wit, of the age of fifteen years; and the said State further avers, that at the time of the execution of the said writing obligatory, to wit, on the eleventh day of March, in the year 1817, the said *William Herman Stump*, still remained an infant, within the age of twenty-one years, to wit, of the age of sixteen years, to wit, at the county aforesaid, and the said *Elizabeth*, then being the wife of the said *Abraham Jarrett*, by and with the consent of the said *Abraham*, then and there made and executed the said writing obligatory, and then and there, by and with the consent aforesaid, undertook the burden of the said guardianship; and the said State further avers, that after the making of the said bond, the said *Elizabeth*, as natural guardian aforesaid, on, &c.; and here an assignment of breach as before.

*Replication to the ninth plea.* That after the making of the said writing obligatory, the said *Elizabeth* as the natural guardian of the said *William Herman Stump*, to wit: and then proceeded to assign a breach as before.

*Replication to the tenth plea.* That at the time of the execution of the said writing obligatory, to wit, on the eleventh day of March, in the year 1817, the said *William Herman Stump* was an infant, within the age of twenty-one years, to wit, of the age of sixteen years, at the county aforesaid, and the said State further avers, that after the making of the said writing obligatory, the said *Elizabeth*, being the natural guardian of the said *William Herman Stump*, as such, to wit, &c; breach assigned as before.

To these *replications* the defendant entered general demurrers, and to which there were joinders in demurrer. The County Court ruled good, the demurrers to the *second*, *seventh* and *eighth* pleas, and overruled the demurrers to the replications to the other pleas, and gave judgment that the plaintiff ought to recover its said debt, &c. By agreement of the parties, the necessity of executing a writ of inquiry was waived, and judgment on the demurrers entered for the penalty of the bond and costs, to be released on payment of, &c. Judgment being thus entered, the defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, and DORSEY, J.

*C. S. W. Dorsey*, for the appellant, contended,

1. That an action cannot be sustained against a surety in a bond, if the principal residing in the same county is not sued.
2. That a suit cannot be sustained on a guardian's bond, for not delivering up the property of his ward before an order has been made by the Orphans Court to that effect.
3. That if the mother, while she is sole, refuses to act as natural guardian, and upon her refusal, a guardian is appointed, she cannot after her marriage and while she is *covert*, accept of, or undertake such guardianship.
4. That a *feme covert* cannot act as natural guardian under the provisions of the act of assembly.
5. That the several replications to the 1st, 2d, 3d, 4th, 5th, 6th, 9th, and 10th pleas,



and especially the one to the 1st plea, are insufficient, and bad on general demurrer; because they do not state that *Elizabeth Jarrett*, the guardian, had not accounted with the Orphans Court, or that the Orphans Court had directed her to pay over to her ward any property of his in her hands.

The questions will principally depend upon the acts of assembly of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 1, 4, and 1816, *ch.* 203, *sec.* 1. 1. A mother is not the natural guardian of her children on the death of her husband. *Co. Litt.* 84, 88, (*note* 12,) *Ratcliffe's case*; 3 *Coke* 38. *Dep. Com. Guide*, 144. 1 *Blk. Com.* 461. 2. If she is not the natural guardian to her children, then her bond was not legally taken under the act of 1816, *ch.* 203. 3. If the mother can be a natural guardian, yet she cannot, if a married woman, act as such. By the act of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 4, the guardian must give bond. This act points out who can be guardian, and how the guardian is to be appointed. A *feme covert* cannot make a contract. The act of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 3, and 1816, *ch.* 203, authorises the taking of the bond of a natural guardian. Under the first act, when called on by some friend of the infant, the guardian is to give bond, but the act does not require that the guardian shall give security; but under the last act security is required. If a mother can be a natural guardian, yet if she refuses, and a new guardian is appointed, who afterwards dies, having accepted, &c. she cannot afterwards be the natural guardian—no right could revert afterwards to her as natural guardian. 4. Can a *feme covert* under the acts of assembly act as a natural guardian? She is not competent to make a contract, except in a few instances, not coming within this case. *Manly vs. Scott*, 1 *Siderf.* 120. The bond of a *feme covert* is *ipso facto* void at common law. 5 *Bac. Ab.* tet. *Obligation*, 161. *Roberts vs. Pierson*, 2 *Wills*, 3. 1 *Bac. Ab. Tit. Baron and Feme*, 507. If she cannot be bound at common law, can she be bound under our acts of assembly? There is no authority given for binding her under the acts of 1798, *ch.* 101, or 1816, *ch.* 203. The act

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of 1798, *ch.* 101, *sub-ch.* 3, *sec.* 1, directs that executors shall give bond with sureties. *Sub-ch.* 4, *sec.* 1, points out who may be an executor, and by *sec.* 7, if above eighteen or under twenty-one years, his bond shall be as binding as if he were of full age. By *sec.* 8, a *feme covert* cannot be an executor, unless her husband shall with two sureties give bond. Also that the bond of a *feme sole* executrix, above the age of eighteen years, shall be binding in the same manner as if she were of the age of twenty-one years. Unless therefore, an act of assembly does expressly give the right to a *feme covert* to be a guardian, and to execute a bond to be binding on her, which she could not do at common law, a bond so executed by her is void. The common law is not repealed unless it is expressly done by act of assembly, *Arthur vs. Bokenham*, 11 *Mod.* 150. If the bond is void as to the principal, she being a *feme covert*, it is void as to the sureties in it, when given to the State, which makes it different from a bond given to an individual. If a *feme covert* cannot bind herself by bond under the acts of assembly, any bond executed by her is void. It is not a bond unless made pursuant to law. A bond given to the State, unless authorised by act of assembly, is a void bond.

5. It is not stated in any of the replications, that *Elizabeth Jarrett* did not account with the Orphans Court, or that, that court had directed her to pay over to her ward any sum of money. 1 *Chitty's Plead.* 599. *Cornwallis vs. Savery*, 2 *Burr.* 774. *Hayman vs. Gerrard*, 1 *Saund.* 101, 102. 5 *Com. Dig.* tit. *Pleader*, (*F.* 14.) (*F.* 15.) (*Q.* 5.) (*M.* 3.) *Gerven vs. Roll*, *Cro. Jac.* 133. *Turner's case*, 8 *Coke*, 133. 6. By the act of 1720, *ch.* 24, no suit can be maintained against a surety in an administration or testamentary bond, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *fieri facias* returned *nulla bona*, &c. The act of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 4, places guardians' bonds on the footing of the bonds of executors and administrators.

*Gill*, and *Taney* for the appellee.

The first question presented by the third plea, is, whether the facts stated in the replication, constitute *Elizabeth Jarrett* natural guardian.

1. The father is the natural guardian of the person of the son (who may inherit from him) until he is twenty-one years of age, and if the father die, the mother is the natural guardian. In maintaining this proposition, the distinction is to be kept in view, between guardian by nature, and guardian by nurture. The first being confined to the heir apparent, the second applying to all the children, and not for the present involving the inquiry as to property, *Co. Lit.* 123, no. 9, and 12, *nurture*, no. 13. *Co. Lit.* 84, *a. and b.* 3 *Co. Rep.* *Ratcliffe's case*. *Carth.* 384, 386. 2 *Fonblanque*, 237, 8 and 9. 2 *Atkins*, 70.—in point. The mother is bound to support and educate the child. *Wilkes and Wife vs. Rogers, et al.* 6 *Johns. Rep.* 566, 575.

It is not necessary to constitute this guardianship by nature, that the mother or even the father had real estate, to which the son could be heir. *Co. Lit.* 84, *a. and b. and* 123, no. 12. 3 *Co. Rep.* 38. 2 *Fonb.* 237, 8 and 9. By the common law, *William Herman Stump* would be the heir apparent to his mother. For it does not appear that there was any other son, none other is alleged in the pleading, and none other will be presumed. But our act of descents has put this point out of the question, for every child is an heir apparent. It may therefore, be safely concluded, that the mother was the guardian by nature, or natural guardian to her son.

2. The guardianship of the person gave the guardianship of the property in question. At the time this bond was given there was no other guardian but the natural guardian, and the custody of the person draws after it, the custody of all property for which the law, has not otherwise provided. *Co. Lit. sect.* 123, no. 13. and note 16. 3d *Kind of Guardian*, 2 *Fonb.* 241; 242, note. 3 *Atkins*, 631. *The King vs. Delaval*, 3 *Burr.* 1436. But even conceding that the last

proposition could not be maintained according to the *English* law; yet by our act of assembly, the custody of the property is by necessary implication given to the natural guardian.

The words guardian by nature must be understood in their legal sense, that is, a giving the custody of the person in the manner heretofore pointed out. It is obvious from the act, that the guardianship of the person and property were to go together, and there was to be no other guardian as to the property, where the infant had a natural guardian. The rights of a natural guardian, and a guardian by statute as regards the property, being the same.

It is very clear that the guardian by statute had the guardianship of the property. 1798, *no.* 101, *ch.* 12.

The mother therefore was, 1. The natural guardian. 2. As such, had the custody of the person and property. If these two propositions be true, then the replication is good, and the demurrer ill.

*3d Point.* But conceding for the sake of argument, that the replication does not show enough to entitle the plaintiff to recover, and that it is therefore bad—yet it is insisted that the judgment in favor of the plaintiff is nevertheless right, because the plea is not a sufficient answer to the declaration, and therefore not a legal bar. 1. On argument of demurrer, the court will give judgment against the party whose pleading was first defective in substance. 1 *Chitty*, 647. *Hob.* 14, 199. 8 *Co. Rep.* 120. *United States vs. Arthur*, 5 *Cranch*, 259. 1 *Saunders*, 285. *no.* 5. 2. Where there are several pleas, each must stand or fall by itself. 1 *Chitty*, 543. 3. Every plea must answer the whole declaration; and if a plea professes to answer the whole, but the matter pleaded is only an answer to part, the plea is ill on demurrer. 1 *Saund.* 28, *no.* 2. 1 *Chitty*, 509. A defeazance being in favor of the obligor, must be strictly performed according to its terms, and the plea must show it. 2 *Saund.* 48, *b. note.* 2 *Chitty*, 481, *note y. and z.* 2 *Chitty*, 485, *excuse, &c.* 4. The plea assumes to answer the



whole declaration, but only answers part. The plea alleges she was not natural guardian. The condition is, not only that she shall account, &c. as natural guardian, but also that she shall "*perform the duty of guardian according to law.*" If, therefore, she was guardian by appointment from the court, the condition of the bond embraces those duties. For aught that appears in the bond, condition, writ, declaration and the plea, (and the court on this point, can notice nothing else,) she was guardian by the court's appointment, or may have been testamentary guardian. The plea should have been, that she was not guardian—and nothing short of this allegation could excuse the performance. If she was guardian in any way, and did not perform the duty, the condition is broken. Conclusion; the plea is bad, and the judgment right.

5. If, however, the bond should be interpreted to be conditional for the performance of her duties as natural guardian, then, it is insisted that the defendant is *estopped* by his bond, from denying that she is the natural guardian. *Allen* 13, *in point*. *Dyer*, 196, *a*. *Cro. Eliz.* 756. 1 *Saun.* 21, *b. no. 2, in point*. The above cases show there is no difference between the formal recital of the fact as a recital, and the necessary implication of the fact from the words of the condition. *Vide Allen*, 13. *Dyer*, 196. 1 *Saun.* 216, *no. 2*. Where the estoppel appears on the record, the plaintiff need not reply the estoppel, but may take advantage of it on demurrer. *Cro. Eliz.* 756. *Dyer*, 196, *e*. 1 *Saun.* 325, *no. 4*. The plaintiff has not lost the benefit of the estoppel by replying, because the estoppel appears on the pleading, and may therefore be relied on, at any time where there is a joinder in demurrer. That joinder puts it to the court to say which party committed the first fault. The cases where the reply deprives the party of the estoppel is where issue is taken on the fact.—It is where the party by replying makes the estoppel matter of evidence only. Matter of estoppel is never such where relied on as evidence. *Hob.* 56. 4 *Co. Rep.* 53. 8 *Rep.* 120. 1 *Saund.* 325, *no. 4*,

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276, *a. no. 2. Outram vs. Morewood*, 3 *East.* 348, 351, 355. *Hob.* 206. Issue was joined on the fact, 2 *Ray.* 1154, *Kemp vs. Goodall*, 2 *Ray.* 1051, *contra*.

The *fourth* plea states, she was a married woman, and therefore, incapable of executing a bond.

The *fifth* plea states, that she was a married woman, and therefore, incapable of accepting the guardianship.

The fourth plea does not deny that she was the guardian, but assuming that she was guardian, pleads that she was covert, and that the coverture avoids the bond, as to her and her securities. The replication alleges her to be guardian, that she gave the bond with her husband's consent, and assigns the breach. To this there was a demurrer. 1. On this issue, the question is not whether she was guardian or not.—It is admitted that she was guardian. Her coverture in this plea, is not alleged as a disqualification; and she is to be taken as guardian notwithstanding her coverture. But the defence is, that being guardian, and being at the same time covert, the bond is void as to her and her sureties. The Orphans Court had power to take a bond from a natural guardian, and on this plea it is not denied, that such power was regularly executed. 1798, *no. 101, ch. 12.* 1816, *ch. 203.* Even if the bond is void as to her, it binds the security. If she did not perform the duty, he is liable by his contract. If the proposition be true that the bond is void, it would come to this, that she would continue guardian without security, in despite of the law which requires it, or that she would be deprived of the guardianship of the child, when she offered to fulfil all the duties of, and, when the law itself imposed on her the guardianship. It would be absurd to suppose that either one of such propositions could be maintained. The replication to the *fourth* plea is good, and the judgment right. 2. But it may be further maintained, that the bond of the guardian is good, and binds her, although she was a *feme covert* at the time. The common law doctrines, as to the disability of *feme coverts*, do not apply in their full extent to the cases of fiduciary appoint-

ments, regulated by the Chancery and Ecclesiastical Courts, whose doctrines are borrowed from the civil law. The case of a *feme covert* executrix will furnish an apt analogy, and shew the rule in all cases like to it. A *feme covert* may, with the consent of her husband (at common law) become executrix, and where she has thus agreed and accepted, she is bound by all the contracts and liabilities attached to the office as if she were sole. 3 *Bac. Ab.* 9. 10. The law does not impose on her the duty of executrix, she becomes such by virtue of her agreement, her contract, and having made the contract, she incurs all the liabilities attached to it, as if she were a *feme sole*. As natural guardian, however, the law imposes the duty upon her as the mother of the orphan. Her consent is not asked nor required. It belongs to her station as mother. But although the law imposes on her the duty of natural guardian, yet, it does not impose on her the obligation of giving bond and surety for the performance of that duty. She may refuse, and if she refuses she ceases to be guardian, and the law transfers the duties and obligations of guardian to the persons appointed by the court. 1798, *no.* 101, *ch.* 12. But with the assent of her husband, she may assent to enter into this obligation, for the same reason that she may take upon herself the obligations of an executrix. She cannot do it without his consent, because his interest is involved in it. But when she has entered into it, it binds her, although she was covert at the time. Her bond therefore binds her, 3 *Bac. Abr.* 9, 10. If this principle is not sound the mother cannot be the guardian of her own children if she marries again—Cannot even be appointed by the Orphans Court, although she wishes it, and her second husband wishes it. It is not, however, necessary to maintain this proposition in order to sustain the judgment of the court on the fourth plea. The grounds taken on the first point are sufficient, whether the *feme covert* be bound or not. The replication is therefore sufficient, and the plea bad, for the reasons assigned.

*5th Plea.* This plea alleges the fact, that she was a married woman at the time she gave the bond, and therefore, incapable of accepting the guardianship. The replication states, that being the natural guardian, she executed the bond and took on herself the burthen of the trust, with her husband's consent. This issue does not bring in question directly, the invalidity of the bond of a *feme covert*. The point presented is this: that being a married woman she could not be guardian, and as she could not be guardian the court could not take her bond. The defendant is estopped by his bond, from alleging that she was not guardian. The guardianship may, for aught that appears in this issue, have fallen upon her when sole, and in that case, her own marriage could not discharge her from the obligations she had before undertaken. Example, executrix marries. A widow may be the guardian of her children by the first marriage. No assent on her part is necessary when the law imposes the duty. There is no difficulty therefore, on the score of her disability to contract. None of the cases intimate that the guardianship of the mother is only *dum sola*. *Byrne vs. Van Hoesen*, 5 Johns. 66, 67. 1 Ball. & Batt. 60, 61. *Freto vs. Brown*, 4 Mass. Rep. 675.

*6th Plea.* The points already discussed apply to this, 1. The defendant is estopped. 2. The mother is the natural guardian where there is none other. 3. The subsequent marriage cannot put an end to her guardianship. 4. The interposition of the former guardian can make no difference when he is dead. The guardianship by nature flows from the natural obligations of parent and child. *Vid. Co. Lit. sec. 123, note 12,*

*R. Johnson in reply.*

1. Is the *first* plea of general performance defective? It is said the bond is in the disjunctive. The plea was the only one which could have been pleaded. Suppose the defendant had pleaded that *Mrs. Jarrett* had faithfully accounted, and it had been proved that she had accounted, but



not paid over. The bond is, that she must account and *pay over*, &c. The plea is, that she did account and pay over, &c. It goes to the whole that she did account—did pay over, and did perform all the duties required of her as natural guardian. In the *Union Bank of Maryland vs. Ridgely, Harr. and Gill*, 324, a plea of general performance would not answer, because the bond did not contain only affirmative stipulations to be performed. *Steph. Plead.* 368.

2. The plea of general performance is a good plea; but the replication to it is bad. If the plea was bad, and the replication was also bad, the defendant can take advantage of the defect in the replication. The rule that you must go to the first fault, does not apply to a case like this—being on a bond with a collateral condition. Suppose the breaches had been assigned in the declaration, instead of the replication, could not the defendant, if the declaration was defective, have demurred to it? Here the true cause of action is set out in the replication, on the assignment of breaches; and the replication is to be considered as a declaration, and the breaches defectively assigned, may be demurred to. 5 *Com. Dig.* tit. *Pleader*, (*M. 3*) 468. *Ridgway's case*, 3 *Coke*, 52. *Steph. Plead.* 162. In *The United States vs. Arthur*, 5 *Cranch*. 259, the defendant did not craveoyer, so that it did not appear, that it was a bond with a collateral condition.

3. The replication is defective, because the breach must be such as to show a good cause of action, and bring the plaintiff within the stipulations contained in the bond. The guardian was not bound to pay over to the ward, any property but such as came into her possession under the act of assembly. The breach is out of the condition of the bond. The act of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 1, 2, 3, points out the particular description of property which is to be placed in the hands of the guardian. The act 1816, *ch.* 203, is similar to the act of 1798, *ch.* 101. The replication states, that *Mrs. Jarrett*, as natural guardian, had in her hands \$20,000, belonging to her ward, &c. Admit this to be a

fact, she might have that sum in her hands as natural guardian, and yet the bond may not be answerable for it. This sum might have come to her hands from a gift, &c. or a prize drawn in a lottery, or in some other manner different from that pointed out by the act of 1798. The bond was given for a limited purpose, and the replication does not state that the above sum came to her hands under the act of assembly.

4. Suppose the bond does cover all money received as guardian, it is not the duty of the guardian to pay over all money he may receive. He is to account with the Orphans Court, and pay over such sum of money as that court may direct him to pay. The bond is to be sued only on the neglect of the guardian to account, or to pay over such sum as the Orphans Court shall direct. It is not stated in the replication that *Mrs. Jarrett* failed to account, or refused to pay over what the Orphans Court directed her to pay.

5. The defence in the *fourth* and *fifth* pleas, is, that the bond is null and void, and these pleas are analogous to special pleas of *non est factum*, and are not different from the plea of *non est factum*, or duress. The doctrine of estoppel does not apply to their being pleaded by the defendant. But suppose it does, the plaintiff cannot take advantage of it. This is in fact the suit of *W. H. Stump*, the *cestui que use*, and who now relies upon the doctrine of estoppel, which must be reciprocal, and bind both parties. Strangers cannot take advantage of it. No one can take advantage of it who is not bound by it. *Co. Litt.* 352, a. Would *W. H. Stump* be bound by the recital in the bond? He would not. The Orphans Court could not bind him, unless by proceedings within the sphere of their duty. Suppose *W. H. Stump* had denied that *Mrs. Jarrett* was his natural guardian, and he had brought suit to recover back the commission allowed to her as guardian, by the Orphans Court, would the recital in the bond that she was guardian bind him?

6. It is the bond of a *feme covert*, and void as to her and her sureties. The question is not whether it would be a good bond at common law, if it had been given for the payment of money; but is it such a bond as is authorised under our acts of assembly? When the Orphans Court take a bond which does not bind the principal obligor, they take a bond which is null and void. But a *feme covert* cannot execute a valid bond, although she may enter into contracts in certain cases. To execute a bond legally, it must bind the heirs of the obligor. This a *feme covert* could not do. She can only contract so as to bind herself personally. *Caudell vs. Shaw*, 4 T. R. 363. But she cannot be a guardian under our acts of assembly, unless she can execute a bond as such; and she cannot do so. The consent of her husband does not make her bond binding. It is to make the husband executor or guardian; it is to bind him and not her; because her contracts, while *covert*, are the contracts of her husband, where she can contract. Here the husband is one of the sureties in the bond, instead of being the principal; and if the defendant pays what is recovered against him by the judgment, he cannot go upon the judgment against the husband, except to compel him as one of the sureties, to pay his proportion of the debt.

7. Is a *feme covert* contemplated by our acts of assembly, to act as natural guardian? She is not, because she must give bond, which she cannot do. Again, she is to account with the Orphans Court, and if she does not, she is liable to be attached and fined. Her husband might if he chose, prevent her from accounting.

8. As to the demurrer to the replication to the *sixth* plea. If she was the natural guardian—whether the intervention of a regular guardian, appointed by the Orphans Court, did not absolve her right as natural guardian? It operated as an extinguishment of her right forever. If the person entitled to the guardianship refuses, the Orphans Court have a right to appoint a guardian. Here *Mrs. Jarrett*, before her second marriage, refused to act as guardian, and a guar-

dian was regularly appointed, and the custody of the ward and his property, were placed under the care of the guardian so appointed. On the death of that guardian, the right devolved on the representatives of such guardian, who were answerable for all loss, &c. and they would continue to have the care of the person and property of the ward until a regular guardian was appointed by the court. But suppose the property of the ward was in the custody of the Orphans Court on the death of *J. Stump*, and the court had a right to appoint another guardian, it would be different from the natural guardian. The court could not in such case appoint a *feme covert*.

*Taney*, for the appellee, after the argument, filed the following notes :

The argument offered by the concluding counsel, in behalf of the appellant, was. 1. That the power of appointing a guardian is confined to the cases where the orphan is entitled to a distributive share, &c. and being appointed in such cases only, his bond covers only property of this description.

2. That the act of 1816, subjects the bond of a natural guardian, to the same rules with an appointed guardian, and therefore covers only property of the same description.

*Answer.* 1. The first proposition is denied, and it is insisted that although the power of appointment is conferred only in the cases enumerated, yet when the appointment is made, the whole property of the infant, no matter how acquired, is committed to the guardian, and he is responsible for it. 1798, *no.* 101, *ch.* 12, *sec.* 5 and 11. If the foregoing be not true, yet the act of 1816 applies to, and covers all the property, no matter how acquired, and that the words referred to in the appellant's second proposition, apply only to the manner and form in which he shall discharge the duty, and do not restrain the general words used in relation to his property and estate.



3. Conceding both of the above answers to be insufficient, yet the replication is good. For if the bond covers only the property before mentioned, then the guardian can receive none other in the character of guardian; and as guardian the averment therefore, in the replication, that she received it as guardian, and that it was due from her as guardian, is an averment that it was property which she was entitled to receive in that character, and by virtue of that authority—and if she could, and did receive it in that character, the bond she gave necessarily covers it, as well as in its language as in its spirit.

There is another view of this case, which occurred after the argument on the part of the appellee was delivered, which is worthy of the consideration of the court, and therefore presented.

The argument on both sides assumed, that if in point of law she was not entitled to act as natural guardian, by reason of her coverture, the bond was void.

Whether this is a sound and safe principle to adopt, the following principles will perhaps test.

1. If the Orphans Court appoint an administrator, and a will is afterwards discovered, yet his acts are as valid and obligatory on the administration, during the time he holds the office, and are the same as if he were rightfully appointed—yet the Orphans Court from a mistake in the fact, would have made an appointment which the law did not authorize.

2. If in a case of intestacy, the Orphans Court appointed one person administrator, when another person was by law entitled to the appointment, and desired to obtain it, yet until these letters were revoked, the party appointed would have the rights, and be subject to the obligations of an administrator. Here would be a mistake in law and not in fact.

The reason of the rule is, that if the court be authorised to decide on the subject—if they decided wrong from a mistake of the law or the fact, yet while the decision stands, all

parties are bound ; and this it is conceived would be the case even if a *feme covert* were appointed, and her husband had not signed the bond, and she alone had signed it.

In the case last supposed would not the securities be bound? Would she be entitled to collect debts and give acquittances, and yet the infant legatees or distributees, be without remedy? Apply these principles to the case of a guardian.

1. Suppose the Orphans Court take a bond from a man as natural guardian—supposing him to be such, when in fact the court are deceived as to the relation in which he stands to the infant. Here would be a mistake in the fact, yet would not his securities be liable?

2. Suppose the court take a bond from a person of whose relation to the infant they are correctly informed, and whom they suppose to be in point of law the natural guardian, and they are mistaken in the law, is not his bond liable?

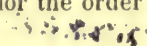
In both of the cases above supposed, the court would by the act of accepting the bond, have decided the right, and it would seem that such decision would stand on the same ground with a decision appointing an administrator.

In the case before the court, the Orphans Court have decided by accepting the bond, that the mother, although married a second time, was the guardian. It has judicially recognized her as guardian. Admit them to be wrong, and to be mistaken in the law, would not a delivery of property to her under the order of the court, discharge the party?

Suppose the court had ordered the executor of the former guardian to deliver the property to *Mrs. Jarrett*, and they in obedience to the order had delivered it—would the security of the executors be still liable?

Suppose a legacy by any one else to the ward, and the court had ordered the executor to pay it to *Mrs. Jarrett*—would the securities of the executor be still liable?

If they would not, then they would not be liable if they paid it without order—for the order of the Orphans Court



could confer no more authority to pay, than the acceptance of the bond itself conferred.

If *Mrs. Jarrett* is so far to be treated as natural guardian, that payments to her would discharge the parties—is the infant ward without remedy?

It is the bond that gives her the right to receive—and if the acceptance of the bond enables her to receive and acquit, and if it be good for that purpose, must it not also be good to compel her to pay?

And if it should even be held that her coverture, was a bar as respects process against her, yet why should the security in bond, which gave her power to take as guardian, be discharged from the obligation of compelling her to pay as guardian?

The inability of the wife to give a bond, is nothing more than her common law inability to contract. There is no peculiar common law disability to give bond.

The case in 4 *T. R.* 363, cited by appellant, does not impeach the proposition above mentioned. The case turned upon the custom of *London*, which is an exception to the common law rule above mentioned—and the case is decided not by the extent of the common law rule, but by the extent and lawfulness of the exception.

The court decide that the custom does not extend to the bond, and that such a custom would not be lawful.

The decision is upon the extent of the exception, and not the extent of the rule.

But the power of a *feme covert* to act as executrix, with the assent of her husband, is part of the common law, and not a part of the local custom law.

It is a limitation of the common law rule, by the common law itself, and it gives a power to contract as executrix, or in a representative character, when she cannot do it for herself.

JUDGMENT AFFIRMED.

N. B. This case was decided in 1827.

WEDGICK & ALLEN

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Turner vs. Plowden, adm'r of Llewellyn.—1832.

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**TURNER, SURVIVOR OF TURNER, vs. PLOWDEN, Adm'r of LLEWELLIN.—December, 1832.**

A judgment in the usual form was confessed, subject to the following terms; "Judgment was rendered in the cause, upon, &c. for the damages laid in the delaration and costs,—to be released on payment of such sum as M shall say is due and costs. To bind a proportion of assets to be ascertained by M." HELD, that this was a final judgment; that to make it absolute, so far as regarded the amount due, no farther action of the court was necessary. The filing of M's certificate thereof, was all that was required for that purpose.

The claim upon which this judgment was founded, was thereby extinguished, and could not afterwards be available, either as a substantive cause of action, or by way of set-off.

**APPEAL from Saint Mary's County Court.**

*Debt on single bill*—Plea, payment, and an account in bar. This case was before in this court, and will be found in 2 *Gill and Johns*. 455. It was then reversed, and sent down with a *procedendo*. At the second trial, the plaintiff (the appellee) read in evidence to the jury, the following single bill, executed by *Josiah Turner*, the appellant, and one *Henry Turner*, since deceased.

"§203 75. On the 20th day of June next, we promise to pay to *John Llewellyn*, (exec'r of *Jeremiah Boothe*,) his heirs or assigns, or order, two hundred and three dollars and seventy-five cents, with interest from date, for value received. *January 25th, 1825.*"

The defendant thereupon, in support of his account in bar, proved, that *John Llewellyn*, rented a tract of land called *Bramley*, of the appellant, for the year 1825, and agreed to pay for the same the sum of \$200.

The plaintiff then read to the jury, the record of a judgment rendered in this court, at August term, 1831, in an action in which the present appellant was the plaintiff, and the appellee, *Plowden* as administrator of *Llewellyn*, was the defendant, and in which the rent, now attempted to be set-off, was declared upon as the cause of action. The judgment was in the usual form of judgments against ad-



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Turner vs. Plowden, adm'r of Llewellyn.—1832.

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ministrators, but had annexed to it the following by way of *memorandum*. "Judgment was rendered in this cause on the 9th day of November, in the year 1831, for the damages laid in the declaration, and costs of suit. To be released on payment of such sum as *Enoch J. Millard* shall say is due and costs. This judgment, to bind a proportion of assets, and so forth, to be ascertained by a reference to *Enoch J. Millard*." And then proved, that it was for the same rent, that was relied upon as constituting an account in bar, in the present action. The plaintiff then prayed the court to instruct the jury, that if they should believe from the evidence, that the judgment was for the same cause of action as is contained in the account in bar, the same should not be credited to the defendant in the present suit; which opinion the court (STEPHEN, Ch. J. and KEY, A. J.) gave. The defendant excepted, and the verdict and judgment being against him he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

*Brewer*, and *Stonestreet* for the appellant, contended,

1. The judgment offered in evidence, is a mere interlocutory judgment, and consequently does not merge the account in bar. The party to whom it was referred has not ascertained the sum to be paid, and it was not therefore in a condition to be enforced.

2. But if it is a final, it is also an absolute judgment; and in that view, will not affect the set-off, but may be itself so connected with it as to establish it. 1 *Saund. Rep.* 336, (a) note 10. 2 *Ib.* 216, 217. The equitable jurisdiction of the court in such a case, will be called in aid of the rules of the common law, for the purpose of doing justice between the parties; it being perfectly evident that the claim sought to be set off is due. 3 *Stark. Ev.* 1318.

*V. H. Dorsey*, for the appellee.

There being a judgment upon the account in bar, it was

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Bradley *et ux.* vs. Hunt, adm'r of Jack.—1832.

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not as such, the subject matter of a set-off—nor could the judgment itself, be set-off, because the amount of it was not liquidated. He referred to *Turner vs. Plowden*, 2 Gill and Johns. 455.

DORSEY, J., delivered the opinion of the court.

We concur with the County Court, in their instruction to the jury, on the account in bar relied on by the defendant, as a set-off to the plaintiff's debt. The judgment rendered upon it was a final judgment. To make it absolute as far as regarded the amount due on the account, no further action of the court was necessary. The filing of *Enoch J. Millard's* certificate thereof, was all that was required for that purpose.

The account was extinguished by the judgment, and could therefore never afterwards be available to the defendant, either as a substantive cause of action, or by way of discount, or set-off.

JUDGMENT AFFIRMED.

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BRADLEY *et ux.* vs. HUNT, Adm'r of JACK.—December, 1832.

A promissory note, payable to a payee or order, is not the subject of a donation *mortis causa*, by mere parol.

The mere delivery by a husband, in his last sickness, to his wife, of a promissory note, payable to him or order, is not valid, as a *donatio mortis causa*. No property in such a note passes by delivery; being a *chose in action*, it must notwithstanding the delivery, be sued in the name of the executor of the husband.

Bank notes, and promissory notes, payable to bearer, pass by delivery as money, and constitute valid donations when delivered; for in such cases the property in, and legal dominion over the thing intended to be given, pass with the possession.

Whether the distinction prevailing in *England*, between the case of a bond and a promissory note payable to order, as to donations *mortis causa*, will be adopted here. (*gr.*)

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Bradley *et ux.* vs. Hunt, adm'r of Jack.—1832.

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## APPEAL from the Court of Chancery.

The appellants, *John Bradley* and *Jane* his wife, (formerly *Jane Jack*,) filed the present bill against the appellee, *Jesse Hunt*, administrator of *William Jack*, on the 20th of April, 1831. The bill alleged, that *William Jack*, the former husband of the complainant, *Jane*, being the owner, and possessor of a certificate or obligation, of the *Maryland Savings Institution*, for a considerable sum of money, in September, 1829, and when the said *Jack* was lying dangerously ill, and expecting to die, gave the same to the said *Jane*, by an actual delivery thereof, in the presence of witnesses, and on the evening of the same day, and within a few hours thereafter expired. That the deceased at the time, was of perfectly sound and disposing mind, memory, and understanding. That the defendant *Hunt*, took our letters of administration upon the said *Jack's* estate, and although the legal interest in said certificate vested in him in that character, yet the gift was good as a *donatio mortis causa*, and vesting the equitable interest in the donee, the said *Hunt* was but a trustee of the legal title for her benefit. That after the death of her husband, the said *Jack*, she the complainant *Jane*, delivered said certificate to his said administrator, for the purpose of his doing what might be necessary to secure her the beneficial use of the same, but that he refuses to recognise her title thereto. The bill then prayed, that said administrator may be compelled to deliver said certificate to the complainants, and to do whatever may be necessary to enable them to receive the money for the same, and for general relief.

The answer admitted, that the intestate in his life-time, owned such a certificate as the bill speaks of, payable to him or his order. That he died clear of debt, and that at the time when the alleged gift is said to have taken place, he was of sound mind, &c. The fact of the delivering of the certificate, by the intestate, to his then wife, (complainant *Jane*,) is not admitted or denied, and complainants are

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Bradley *et ux. vs.* Hunt, adm'r of Jack.—1832.

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put to the proof of that fact. That shortly after the decease of his intestate, and before he had taken out letters of administration on his estate, the complainant *Jane*, came to him the defendant, *bringing in her hand* the certificate aforesaid, saying that it had been given her by her deceased husband, by an unwritten or nuncupative will. That after the defendant had become the administrator of the said *Jack*, he paid the complainant *Jane*, her full distributive share of her husband's estate, but that he could not recognize her right to said certificate, which was not endorsed by his intestate, and upon which, when he obtained the money at the *Savings Institution*, he was required to endorse his name as his administrator. The answer admits the intermarriage of the complainants.

The certificate of the *Savings Institution*, the subject of this suit, is in the following form:

“Certificate of special deposit, No. 755.

\$568.

*Baltimore*, January 1st, 1829.

*Mr. Wm. Jack* has this day deposited in the *Maryland Savings Institution*, five hundred and sixty eight dollars, which sum, with interest thereon, at the rate of four *per centum per annum*, will be paid to his order at thirty days sight.”

A commission issued to take evidence, and proof was offered of the delivery of the certificate to the complainant *Jane*, by her former husband in his last illness; and by the defendant it was proved, that he had paid her, her distributive share of her former husband's estate. The proof is not introduced, because no question in regard to its sufficiency or insufficiency, was made in the argument, or decided by this court.

BLAND, Chancellor, (at Sept. term, 1831,) dismissed the bill with costs, when the complainants brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and ARCHER, J.



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 Bradley *et ux.* vs. Hunt, adm'r of Jack.—1832.
 

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*Campbell* for the appellants.

The certificate vested in the complainant *Jane* as a *donatio causa mortis*, and consequently the administrator has no title to the same, or only as the trustee of the complainants. 2 *Pow. on Mort.* 1047. *Hedges vs. Hedges*, *Prec. in Chanc.* 269. 1 *Roper on Leg.* 26, 27. The intention to give, and the delivery, being clearly proved or admitted, the only question is, whether the thing be susceptible of a *donatio mortis causa*.

There is a difference between the giving the donor's own note, and the note of a third person. The delivery of the latter may be good as a *donatio mortis causa*, when the former would not. *Tate vs. Tilbert*, 4 *Bro. Ch. R.* 286. *Pennington vs. Gittings*, 2 *Gill and Johns.* 217. *Drury vs. Smith*, 1 *P. Wms.* 404. *Lawson vs. Lawson*, 1 *Ib.* 440. *Miller vs. Miller*, 3 *Ib.* 356. *Hill vs. Chapman*, 2 *Bro. Ch. R.* 612. Although the failure of the donor to endorse the certificate, would render it necessary for the donee to use the name of his legal representative to recover the money by suit, still the equitable interest would pass. *Noland vs. Ringgold*, 3 *Harr. and Johns.* 218. *Williamson vs. Allen*, 2 *Gill and Johns.* 355.

*Nicholas* for the appellee.

The question is, whether a note payable *to order*, and not endorsed by the payee, can be the subject of a *donatio mortis causa*? That it cannot, he referred to *Pennington adm'r of Patterson vs. Gittings*, 2 *Gill and Johns.* 216. *Miller vs. Miller*, 3 *P. Wms.* 356. *Ward vs. Turner*, 2 *Ves. Sr.* 431. *Duffield vs. Elwes*, 1 *Peters' Cond. Ch. R.* 120. 2 *Kent's Com.* 362. He insisted that the gift was not complete, because the money could not be received by the donee without the endorsement of the donor's representative, and as the court would not compel the donor if alive, to consummate the gift, so neither will they compel his representative, the present defendant.

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Bradley *et ux.* vs. Hunt, adm'r of Jack.—1832.

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BUCHANAN, Ch. J., delivered the opinion of the court.

We are relieved from an examination of the question of fact, whether there was or not, a sufficient delivery by *William Jack*, the deceased, to the wife of the complainant, *John Bradley*, of the instrument of writing which forms the subject of the bill, that question being waived by the counsel on the part of the appellee; and the only inquiry to which our attention is directed, is, whether a promissory note to the payee or order, is the subject of a *donatio mortis causa*, by the payee. It is a settled rule by law, that such a gift cannot be by mere parol, but that a *delivery* of the thing intended to be given, is essential to the perfection of the gift; and it was so held by this court, in *Pennington adm'r of Patterson vs. Exec'r of Gittings*, 2 Gill and Johns. 218, which was the case of a delivery by a father to his daughter, of a certificate of shares in the capital stock of a bank; and the object of the bill was to compel the executor of the father to transfer the stock to the daughter, to whom, it was the intention of the father to have given it. But as the delivery of the *certificate* was not a transfer and delivery of the *stock*, the *thing* intended to be given, and which could only be *transferred* on the books of the bank, it was held, not to be a donation *mortis causa*, for want of such transfer, that being the only mode in which the shares of stock were susceptible of being delivered.

To constitute a *donatio mortis causa*, the gift should be full and complete at the time, passing from the donor the legal power, and dominion over the thing intended to be given, and leaving nothing to be done by him, or his executor, to perfect it. Hence bank notes are the subjects of such gifts, they being considered as money, and the property in them, passing by delivery. *Miller vs. Miller*, 3 P. Wms. 335—and so as to promissory notes payable to bearer, which pass by delivery, and the property, and legal dominion over the thing intended to be given, passing with the possession from the donor to the donee, they do not require

to be sued in the name of the executor, and nothing is necessary to be done by him to perfect the gift of the money.

But not so with the delivery of a promissory note payable to order, which has been held to be insufficient to pass to the donee, the money, the thing intended to be given; upon the ground that no property in it passes by delivery, and being a mere *chose in action*, it must notwithstanding the delivery, be sued in the name of the executor. So that the gift of money is not complete at the time, the legal dominion over it, remaining in the donor, and on his death, passing to his executor, without the use of whose name it cannot be perfected.

This may seem to be technical; but if the rule is admitted, that a delivery of the thing intended to be given, is essential to the perfection of the gift, it must follow, that a promissory note payable to order, is not capable of being the subject of a *donatio mortis causa*. And if we were at liberty to do so, we should not be disposed to relax the rule, which would be to open still wider, the door already sufficiently wide, to frauds and perjuries, and the exercise of undue influence by the artful and designing, upon the weak and unwary.

There has been an exception to the rule, in the case of a bond. In *Snellgrove vs. Baily*, 3 Atk. 214, the delivery of a bond was held by Lord Hardwicke, to be a good *donatio mortis causa*. And in *Ward and Turner*, 2 Ves. Sr. 431, he assigns as reasons for that decision, "that he who has possession of a bond, may destroy it, the consequence of which is, that it puts it in his power to destroy the obligee's power to bring an action, because no one can bring an action on a bond without a *profert in curia*," and "that the law allows it a locality, and therefore that it is *bona notabilia*," and adds, "that this is conclusive." And in *Gardner vs. Parker et al.*, 3 Mad. Ch. R. 102, the Vice Chancellor, relying upon *Snellgrove vs. Baily*, made a similar decision.

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In *Duffield vs. Elwes*, 1 *Sim. and Stewart*, 239, the Vice Chancellor said, he considered “the case of a bond to be an exception, and not a rule.” The reasons assigned by *Lord Hardwicke* for his decision, that a bond is the subject of a *donatio mortis causa*, do not exist here, and whether the distinction prevailing in *England*, between the case of a bond, and a promissory note to order, (the force of which is not now perceived,) should be adopted here, it will be time enough to determine when the question shall be brought before us.

DECREE AFFIRMED.

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ISAAC MCPHERSON'S adm'RS vs. ISRAEL, adm'r *d. b. n.*—  
*c. t. a. of AGNEW.*—*December, 1832.*

It is in general, the duty of the Orphans Court to determine the commissions of an executor or administrator, by allowing a per centage upon the inventory of the deceased's estate; and that includes, in an enlarged construction, all the assets accounted for.

One of the limitations to the exercise of the discretionary power of the Orphans Court, prescribed by the act of 1798, *ch. 101, sub-ch. 10, sec. 2*, is, that the court shall not allow a less rate of commission than 5 per cent. but this only applies to those cases, where there has been a full administration by the first executor or administrator.

Under the act of 1820, *ch. 174*, taken in connexion with the act of 1798, in cases of partial administration, where there is a further administrator to be paid for services, the court may allow such compensation to the first administrator, as the services performed actually merit. They may give one *per cent.* or even less; whatever is allowed must nevertheless be a per centage on the whole assets. This is the only standard under the law, whereby to ascertain his commissions.

APPEAL from the Orphans Court of *Baltimore* county.

The appellee, *Fielder Israel*, as administrator *d. b. n.* of *Andrew Agnew*, filed his petition in the Orphans Court for *Baltimore* county, on the 29th of September, 1828; alleg-



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ing, that letters of administration on the estate of the said *Andrew Agnew*, had been granted to *Isaac McPherson*, (the appellants' intestate,) who had departed this life without fully settling the estate, having in his hands sundry bonds, notes, accounts, and evidences of debt, belonging to the estate of the said *Andrew*, and a balance in cash, and other property; and praying that the appellants, *Esther McPherson* and *David Hoffman*, administrators of *Isaac McPherson*, may be required to render an account of the estate of the said *Andrew*, up to the time of the death of their intestate—and that they should be decreed to deliver over to the petitioners all the bonds, notes, &c. belonging to that estate.

The defendants, (the appellants) with their answer, exhibited the copy of an account, which they have settled in the Orphans Court, after the death of their intestate, *Isaac*, and admitting the facts contained in the petition, asked that their intestate should be allowed a commission according to the act of assembly, for his services as administrator of *Agnew*, upon the sum of \$26,371 68 being the amount of the inventory of said *Agnew's* estate, and of claims, &c. collected by their said intestate in his life-time. Various accounts were exhibited with this answer, showing that the actual payments and disbursements of *McPherson*, as administrator of *Agnew*, amounted to \$9,426 76.

The Orphans Court, after ordering the appellants to pay over to the appellee, the bonds, notes, and other property of *Agnew*, order and adjudge that the appellants be allowed a commission at the rate of *ten per centum* on the said sum of \$9,426 76, and that they retain the same out of the money belonging to the estate of *Agnew*, which their intestate *Isaac* had in his hands at the time of his death. From this decree the appellants appealed to this court.

The cause came on to be argued before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

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*Mayer*, for the appellants, contended,

1. That the *minimum* rate is 5 per cent. 2. That the amount, or fund on which it is to be allowed, is the amount of the inventories and debts, (at least of debts collected or secured,) and of money, and other personal property. 3. That the act of 1820, *ch.* 174, does not, (especially where, as here, an account has been rendered by the deceased administrator) repeal the provisions of this testamentary system of 1798, on the subject of commissions. He referred to the case of *Wilson vs. Wilson, 3 Gill and Johns.* 20.

*Gwynn*, for the appellee.

The act of 1798 regards the commission to be allowed an executor or administrator, who has fully settled the estate, and the commission is to be allowed only on the property and debts, which have been actually collected.

The act of 1820, *ch.* 174, does not limit the court in allowing a commission to an administrator who has not settled the estate, except as to the *maximum*. They may allow as *little* as they please, and this act applies to every case where the estate is not fully settled.

EARLE, J., delivered the opinion of the court.

The appeal in this case is from the Orphans Court of *Baltimore* county. The appellants are the administrators of *Isaac McPherson*, who administered on the estate of *Andrew Agnew*, deceased. He was in the administration about three years when he passed his first account, and departed this life soon after. Letters of administration *de bonis non*, with the will annexed, were granted to *Fielder Israel*, who called the appellants before the court to pass a further account of *Isaac McPherson's* administration of *Andrew Agnew's* estate, and to deliver to him all the bonds, notes, accounts and evidences of debt, which the deceased administrator may have taken, received or had, as administrator, at the time of his death, and also to pay over to him all the

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money in the hands of such deceased administrator as such, at the time of his death. The appellants complied with the requisition in all respects, and asked the court to grant to them, in behalf of their intestate, to be taken into his estate, a commission of at least *five per cent.* on the amount of assets accounted for by him, comprising the specific property included in the inventory, the debts received by the administrator, &c.

Upon this question the court deliberated, and finally refused the petition of the appellants, and granted to them *ten per cent.* on the money paid away by the administrator, towards the debts of the deceased, and the expenses and disbursements of the administration. They amounted to \$9,426 76, and at the per centage allowed, yielded a commission of \$942 67. This fell below the product of a commission of five per centum upon the whole estate, and the allowance caused the appeal in this case, the appellants contending that the court had not the power to grant to them in behalf of their intestate, a commission lower than the *minimum* rate of commission fixed by law.

We have given to this appeal its due attention, and there is not a doubt on our mind, that the Orphans Court were in the main right in the judgment they pronounced in this case. Whether *Isaac McPherson* merited a larger sum for the services he rendered, is not for us to decide. We have not, and cannot have the same view of the subject the Orphans Court had, and we could not say, if it was our province to determine, as accurately as that tribunal, what reward he was entitled to have. Our opinion however is, that they have not exceeded their authority, and that under the circumstances of this administration, they had the power to grant to his administrator a commission less in amount than the sum, the *minimum* rate of commission of *five per cent.* on the whole estate would produce. This is one of the limitations to the exercise of the discretionary power of the court, prescribed by the act of 1798, *ch.* 101, *sub-ch.* 10, *sec.* 2; but it is manifest from a view of the whole law, the limitation

was only intended to apply where the administration was full and complete.

This construction, however, of the act of 1798, need not be insisted on, since the act of 1820, *ch.* 174, *sec.* 6, puts it beyond a doubt. By this section, the *minimum* rate of allowance is purposely omitted to be mentioned, and the court have an unquestionable power, in case of a partial administration of a deceased person's estate, and where there is a further administrator to be paid for services, to allow such compensation as the services performed actually merit.

In declaring this opinion, we cannot agree with the Orphans Court in their reasoning upon this subject, nor in the manner they have made the allowance. They have allowed a ten per cent. commission on the money paid by the administrator towards the debts of the deceased, and the expenses of the administration. This was the mode of allowance pursued by the law anterior to the act of 1798, but was thereby abrogated and repealed. The inventory of the deceased's estate, and in an enlarged construction of this, all the assets accounted for by the administrator, is the true standard by which to ascertain the commission.

Where there has been a full administration, as we have said before, the court cannot descend below five per cent. on the whole property, but where the duty of administering the whole estate has been but in part performed, to make just and suitable remuneration for what has been done, they may give, if the circumstances require it, one per cent. and even less if necessary. Whatever is allowed must nevertheless be a per-centage on the whole assets, as this is the only standard known to the law, whereby to ascertain the commission. Supposing the Orphans Court assumed a mistaken standard, for the ascertainment of the commission, and might on consideration be disposed to change the amount granted by them, we reverse their decision, and direct the record to be returned to them.

**DECREE REVERSED, AND THE PROCEEDINGS REMANDED  
TO THE ORPHANS COURT.**



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Mackall vs. Jones, Ex'r of Darnall.—1832.

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**MACKALL S. COX vs. JONES, Surv'g Ex'r of DARNALL.—**  
*December, 1832.*

It is only upon the case made in the pleadings that a plaintiff can ever recover ; it is always necessary therefore, that the declaration should set out a good and sufficient cause of action, to be judged of by the court.

Where a declaration professed to be founded on a decree in chancery for the payment of money, and sets out certain mutilated proceedings in chancery, which show no such decree, nor whether there ever was a final decree in the cause, it cannot be the foundation of a judgment for the plaintiff.

An action at law will not lie to enforce a decree in chancery, within the territorial jurisdiction of the Chancery Court.

**APPEAL from Prince George's County Court.**

This was an action of *Debt*, instituted by the appellee, against the appellant, on the 21st of March, 1825. The declaration set forth the institution of a suit in chancery—that it was subsequently referred by the Chancellor to the auditor, to state an account between the parties, with the usual power to take proofs ; that the auditor gave notice, and after several adjournments, hearing parties and proofs, stated and returned an account to the Court of Chancery, by which the complainants were indebted to the defendant in chancery, \$1233 80, &c. ; that his report was confirmed by the Chancellor ; that this decree of the Chancellor was still in force ; that the defendant in chancery had not obtained execution upon such decree, and that the amount thereof is still unpaid, whereby an action accrued, &c.

The defendant pleaded *nul tiel record*, and payment, to which issues were taken.

1. At the trial of the issue before the court, upon the plea of *nul tiel record*, it was contended for the defendant. 1. That there was an essential variance between the plaintiff's declaration and the report of the auditor, and the Chancellor's order thereupon ; that all the material parts of the said report and order, were not substantially set forth in the said declaration. 2. That no recovery in this action could be had, because the order, or decree of the Chancellor, was not a final decree, and the case in which the same was made, is still pending in the Chancery Court:

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But the court (KEY and PLATER, A. J.,) overruled the objections, being of opinion that there was no material variance between the declaration and the said report and order, and that it was competent for the plaintiff to recover upon them in this action. The report and orders not being material in the view taken by the appellate court, are omitted.

The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Alexander*, for the appellant.

*Brewer*, for the appellee.

BUCHANAN, Ch. J., delivered the opinion of the court.

The pleadings in this case are so exceedingly irregular, and the record is in so confused a state, that it has been found difficult to make any thing out of it. This much however, we have been able to discover, that it is an action of debt, upon what is stated in the declaration to be a decree in chancery, for a sum of money, against *Mackall S. Cox*, the appellant, in favor of *John Darnall*, the testator of the appellee. And that which is set out in the declaration, as the decree which the suit was brought to enforce, appears to have been an order for an account in some proceeding, it does not appear what, instituted by *Mackall S. Cox*, against *Notly Maddox*, and *John Darnall*, in pursuance of which an account was stated by the auditor, showing there was a debt due from *Cox*, the complainant, to the defendant, *John Darnall*. What further proceedings there were in the cause, or how, or whether it ever was finally disposed of, is not stated in the declaration. Upon that declaration, the court determined that the appellee, the plaintiff below, was competent to recover.

It is only upon the case made in the pleadings, that a plaintiff can ever recover; it is always necessary therefore,

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that the declaration should set out a good and sufficient cause of action, to be judged of by the court.

There is no such cause of action set out in this declaration. If in any case a decree in chancery, could be enforced by an action at law, within the territorial jurisdiction of the court of chancery, this is not such a case. The declaration professes to be founded on a decree in chancery, for the payment of money, and sets out certain mutilated proceedings in chancery, which show no such decree, nor whether there ever was a final decree in the case. It does not therefore set out a good and sufficient cause of action, but is bad upon the face of it, for want of a sufficient cause of action being stated. But it has been decided by this court, that an action at law will not lie to enforce a decree in chancery, within the territorial jurisdiction of the Chancery Court. And if the declaration did well, and sufficiently set out, a regular and final decree of the Court of Chancery of this State, for the payment of money, the action could not be sustained.

JUDGMENT REVERSED.

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CHRISTOPHER HUGHES vs. ELIZABETH YOUNG.—*December, 1832.*

In 1780, R demised to L a tract of land for ninety-nine years, at a certain annual rent, and covenanted to renew the lease upon the payment of a year's rent, as a fine for other ninety-nine years, to commence from the expiration of the first term, and also that L should quietly enjoy the premises upon payment of the rent. The lease reserved the usual right to re-enter for non-payment of rent, but contained no agreement in relation to the payment of taxes. In an action of covenant brought upon this lease in 1828, it was HELD, that the taxes assessed upon, and chargeable against the demised premises, were due from, and payable by the lessee or his assigns, and that he could not set-off a payment of taxes, against a claim for rent.

APPEAL from *Baltimore County Court*.

This was an action of *Covenant*, commenced by the appellee against the appellant, on the 1st of September, 1828, on an indenture of lease; the plaintiff being the heir at law of the lessor, and the defendant the assignee of lessee.

The following statement of facts was submitted for the opinion of the court.

It is agreed between the parties in this case, that, on the 5th day of August, 1780, the following lease was executed, by and between the parties thereto. "This indenture, made this 5th of August, 1780, between *Charles Ridgely*, of *John*, of, &c. of the one part, and *James Lyston*, of, &c. of the other part; witnesseth, that the aforesaid *C. R.* in consideration of the rents and performance of the covenants hereinafter mentioned, on the part of the said *J. L.*, and his assigns, to be paid and performed, hath demised, &c. and by these presents doth demise, &c. unto the said *J. L.* all that lot of ground, being part of a tract of land called *Howard's Timber Neck*, lying in the county aforesaid, and beginning for the part now demised, at the beginning of *Jesse Hollingsworth's* lot, and running thence, &c. containing six acres and one quarter of land; together with all the improvements, ways, roads, waters, water courses, privileges, easements, and advantages, to the said parcel of land belonging, or in anywise appertaining, to have and to hold the said land and premises, with their and every of their appurtenances, unto the said *J. L.*, his executors, administrators and assigns, from the 1st of January, then last, until the full end or term of *ninety-nine years*, from thence next ensuing, fully to be completed and ended; paying therefor, yearly to the said *C. R.*, his heirs, &c., the rent of twelve pounds, twelve shillings, sterling money; and if it shall happen that the said yearly rent shall be in arrears and unpaid for the space of ninety days, next after the term on which the same is above reserved to be paid, the same being first lawfully demanded, that then it shall and may be lawful, to and for



the said *C. R.*, his heirs or assigns, into the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, occupy, and enjoy, as in his or their former estate, until all such arrearages of rent, with legal interest therefor, and all and every cost, charge, and expense incurred by the said *C. R.* his heirs or assigns, by reason of the non-payment of the said rent shall be fully satisfied and paid, or make distress therefor, at his or their option; and if it shall happen, that the said yearly rent, or sum of twelve pounds, twelve shillings, sterling money, or any part thereof, shall be in arrear and unpaid for the space of six months, next after the time on which the same is above reserved to be paid, the same being first lawfully demanded, that then it shall, and may be lawful, to and for the said *C. R.* his heirs and assigns, into the said demised premises, or any part thereof, in the name of the whole re-enter, and the same to have again, repossess, occupy, as in his and their former estate, and that then, and in such case, this indenture, and every clause, matter and thing therein contained, shall, from thenceforth be utterly void and of none effect; and the said *C. R.* for himself, his executors, administrators and assigns, doth covenant and agree, to and with the said *J. L.* his heirs and assigns, on the payment of the rent and performance of the covenants hereinbefore mentioned, and reserved on the part of the said *J. L.* and his assigns, to be paid and performed, shall and may peaceably and quietly have, hold and enjoy the above demised lands and premises with the appurtenances, for and during the aforesaid term of ninety-nine years, for which the same is above demised, without the trouble, interruption and disturbance of him the said *C. R.*, his heirs or assigns, or any other person or persons claiming any thing therein, by, from or under him, them or any of them, or by his or their means, privity, or procurement; and also that he the said *C. R.*, his heirs and assigns, at any time or times hereafter, during the continuance of this present demise, on the request, and at the proper cost and

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charge of the said *L.*, his heirs or assigns, and on his and their paying, or tendering in payment the sum of twelve pounds twelve shillings, sterling money, as a fine therefor to the said *C. R.*, his heirs or assigns, make and execute, or cause to be made and executed, a new lease of the above demised lands and premises, for other ninety-nine years, to commence and take effect from and at the end of the term for which the same is above demised, subject to the same rents, and under the like covenants, clauses and agreements as are hereinbefore mentioned, so that this present demise may be renewable and renewed. In witness whereof, the parties have hereto set their hands, and affixed their seals, the day and year above written.”

It is further agreed, that the plaintiff was, from before the 1st day of January, 1825, thenceforth, and at this time, is legally vested with all the right, title and interest in and to the premises in said lease described, which the said *C. R.* possessed, immediately after the execution of the said lease, and that the defendant was, before the said 1st day of January, 1825, thenceforth, and now is vested with all the right, title and interest, which the said *J. L.* had immediately after the execution of the said lease. It is also agreed, that the premises are wholly unimproved; that the same have been, for the purpose of taxation, assessed by the proper authority at the sum of \$448, which assessment is always *one-fifth* of the actual value of the property, when assessed. And further, that improvements on property are always assessed separately from the land itself. It is further agreed, that in regard to the premises in question, the defendant is the party in fact, against whom the taxes hereinafter mentioned, during the period alluded to, have been charged. It is admitted that there remains due and in arrear, the sum of \$214, with an average interest from the 1st day of July, 1828, for rent stated and reserved in and by the lease aforesaid, to be payable thereby. And it is further admitted, that there has been paid by the defendant, for taxes assessed

upon the premises, since the 1st of January, 1825, the sum of \$51 56, in equal, or nearly equal annual payments.—Upon the foregoing statement, the following questions are submitted to this court.

*First*, are the taxes assessed upon and chargeable against the premises aforesaid, due from, and payable by the plaintiff or the defendant.

*Second*, if the whole of the taxes is not payable by either party, what portion is payable by the plaintiff, and what portion for the defendant.

It is further agreed, that the court shall enter up judgment, either for the whole of the rent stated to be in arrear, or for such balance as shall, by them be decided to be due, according to their decision upon the foregoing question; it is finally agreed, that all errors in the pleadings be mutually released, and that either party, or both parties may appeal to the Court of Appeals.

On the preceding statement of facts, the County Court gave judgment for the whole amount of the plaintiff's claim, being \$214, with interest from the 1st of July, 1828, and costs.

From this judgment, the defendant prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

*Walsh*, for the appellant.

The question is, whether the owner of the fee, or the tenant, the lessee, is liable for taxes levied on the demised premises. He contended that they were payable by the former, and if the tenant paid them, he could set them off in an action of covenant, brought by the landlord for his rent. *Woodfall's Land. and Tenant*, 275, 6, 7. Act of 1812, ch. 191, sec. 36. *Graham vs. Wade*, 16 East. 29. It is not said in the case stated, that the property in question, improved in value from the date of the lease, in 1780, to 1825. The assessment appears to been made upon the

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unimproved land. In reference to the public, the tenant is no doubt responsible for the taxes; and being consequently obliged to pay them, the right to discount the amount from the landlord's rent, would seem to be clear.

*Williams and Johnson*, for the appellee.

1. This being a case stated, the court can *infer* nothing. The judgment must be according to the facts expressly alleged. *Hysinger vs. Baltzell*, 3 *Gill and Johns*. 158. And the question therefore is, has a lessee in any case of this kind, a right to deduct taxes paid by him, imposed for State, or local purposes, from the rent due his landlord.

It does not appear whether the taxes were imposed for State or city purposes; nor whether they were levied under the act of 1817, *ch.* 148, or the act of 1812, *ch.* 191. In regard to the taxes in virtue of the act of 1817, the lessor is never answerable, though he is for those imposed under the act of 1812; and as the statement does not say, under which of these laws the taxes in question were levied, the judgment must be affirmed. *Mayor and City Council vs. Chase*, 2 *Gill and Johns*. 376.

2. There is no obligation on the part of the landlord, to pay the whole amount of the taxes, either on the original, or appreciated value of the property. Even if there had been an express *covenant* by the landlord to pay taxes, still the tenant would be responsible for that portion, which accrued in consequence of an enhancement on the value of the property subsequent to the lease. The value of the property as ascertained by the lease, would be the measure of the landlord's responsibility. *Watson vs. Atkins*, 3 *Barn. and Ald.* 647. *Watson vs. Home*, 14 *Serg. and Low.* 45. The act of 1812, *ch.* 191, *sec.* 36. 1785, *ch.* 53, 1797, *ch.* 89, *sec.* 41. *Woodfall's Land. and Tent.* 276.

But upon such a lease as the present, the landlord is not liable for any portion of the taxes. The question arises upon the covenants of the defendant, and not those of the landlord, who only covenants for quiet enjoyment. This covenant then, is to be taken most strongly against the co-



venantor. *Woodfall*, 369. 1 *Wheat. Selw.* 376. *Wagner vs. White*, 4 *Harr. and Johns.* 564.

The covenant here is, that the lessee will pay a certain amount of rent annually to the landlord, and there is nothing in the contract to qualify this engagement, or to discharge the tenant *pro tanto*, if he is made to pay taxes to the government. Nothing but an express stipulation would entitle the plaintiff to deduct these taxes. *Fowler vs. Bott*, 6 *Massa Rep.* 63.

Leases like the present, are considered as sales of the property for the term, and the tenant is bound for all burdens which may be imposed on it during that period. If the taxes are reduced, he is relieved; if increased, he must bear the burthen. If the property enhances in value, he enjoys the advantage; if it depreciates, it is his loss.

If the landlord is liable for the taxes, then if they should be so increased as to exceed the amount of the rent, the latter would be entirely extinguished; which is a result, to which the court would not come, unless it was manifest that the parties intended to make a contract, from which such consequences might flow. No such stipulation is contained in the contract, and the court is called upon to interpolate it. If demised premises are destroyed by fire, the tenant is nevertheless bound for the rent, and the court cannot aid him; and if it is incompetent to do so in the case of a total destruction of the property, what pretence is there for the exercise of such a power, upon the ground of his being subjected to some additional burden. The same would be the case if a portion or even the whole of the premises should be condemned by the public, for public purposes. But the court, in this case, is not only called on to introduce a stipulation into the contract of the parties, throwing on the landlord a liability for taxes; but it is asked to say, that the contract intended, that he should pay taxes imposed by a particular act of assembly—the act of 1812.

The rule is, that the insertion of particular covenants, is an exclusion of all others; and consequently, as the land-

lord in this lease has covenanted for quiet enjoyment, and for further assurance, he is not by implication to be saddled with others.

This lease having been made in 1780, cannot be affected by the acts of 1785, and 1812, and is not to be construed with reference to their provisions.

In *England*, leases made prior to the statute in reference to the land tax, do not subject the landlord to the payment of such tax, when the lease itself is silent on that subject. Leases made *since* the statute, are differently expounded, because the judges suppose such leases are made with reference to the law. *Bradbury vs Wright*, 2 *Douglass*, 624. *Woodfall*, 276. In some cases, a covenant to renew, makes the lease renewable for ever, but there can be no doubt of the present being a perpetually renewable lease. 5 *Bro. P. Cases*, 519, 522. *Woodfall*, 146, 204.

*Walsh*, in reply.

In the absence of evidence to the contrary, the legal presumption is, that the tax was levied on the interest of the landlord. It cannot be inferred from the case stated, that the rent reserved, was exactly proportioned to that interest; and consequently, it cannot be known with certainty what the parties contemplated on the subject of the taxes. The rent may have been higher than it would otherwise have been, because of understanding at the time, that the landlord should pay the taxes. In the case stated, it is expressly said, that the property is unimproved, and as there is no distinction between improvements, resulting from natural or other causes, and improvements made by the tenant; it must be understood as meaning, that it was not improved in any way, or to any extent, and therefore, the taxes now in question, were levied on the original and unenhanced interest of the landlord.

The legal presumption is, that the taxes were imposed for the purposes of the State. *Woodfall*, 254. *Doug.* 614, 615.

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Hicks vs. Hicks and Norris.—1832.

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It is said that the act of 1817, exempts the landlord from taxation. This is not so; though for the purpose of facilitating the collection of taxes, it authorises a resort to the occupier or his property. *Mayor and City Council of Balt. vs. Chase, 2 Gill and Johns.* 310, 381.

The question then is, whether taxes imposed for State purposes, and for the general good, are to be borne by the interest of one of the parties only, and the interest of the other is to be wholly exonerated.

No case can be found in which such a lease as the present has been adjudged to be renewable for ever, looking only to the covenants contained in it, and disregarding the acts of the parties. *Woodfall*, 146, 147. But be this as it may, it would seem a strange anomaly, that the interest of the landlord, distinct and palpable as it is, should be totally exempt from taxation, whilst that of the tenant is made to bear the whole burden of the government. The case in 14 *Serg. and Low.* 45, and all the cases cited on the other side, only show, that the landlord is not liable for taxes on the *improved* value of the property, and this because he does not enjoy the benefit of such improved value.

JUDGMENT AFFIRMED.

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HICKS vs. HICKS AND NORRIS.—*December, 1832.*

A mortgagee may become the purchaser of the equity redemption, if he does not make use of his incumbrance to influence the mortgagor to part with the estate for less than its real value.

Where the relation of mortgagor and mortgagee exists, and the latter purchases from the former his equity of redemption, worth from \$2000 to \$2500 for \$1600, this is not such an inadequacy of price, as to induce a Court of Equity, in the absence of corroborative proof, to impeach the sale as unfair. It is a circumstance to be weighed in the consideration of the subject, but it is not, unsupported, to overbalance other facts indicating an honest negotiation between the parties.

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An instrument or defeasance executed by the grantee, at the time of the execution of an absolute conveyance to him, for reconveyance to the grantor on his paying a sum of money, may constitute the transaction a mortgage; but such an instrument does not always operate that effect.

The character of the transaction must in every case depend on the inquiry, whether the contract is a security for the re-payment of money. If it is, the parties are in the relation of mortgagor and mortgagee. If it is not, the transaction must take the stamp of a conditional sale.

A case of conditional sale.

### APPEAL from the Court of Chancery.

The present bill was filed by the appellant, *Elijah Hicks*, against the appellees, *Charles G. Hicks* and *Thomas A. Norris*, on the 23d of May, 1828.

The complainant alleged, that in the year 1818, he borrowed from the appellee, *Charles G. Hicks*, the sum of \$500, for which he was to pay an interest at the rate of nine *per centum per annum*, and that he gave his bond or note, for the amount of the loan. That some time in April, 1824, the said *Charles G.* called on complainant for payment, and being unable then to pay either principal or interest, he agreed to give him a mortgage on a lot of ground in the city of *Baltimore*, of which he was seized, and accordingly on the 8th of the same month, he executed such an instrument, and at the same time, paid said *Charles*, the sum of \$106 36 in part of the debt. That notwithstanding the recital in said mortgage, that the mortgagor had given the mortgagee his bond for \$1244 32, without interest for two years, yet the only debt due from him to said mortgagee, was for the before mentioned loan in 1818, with interest thereon, and the further sum of \$90, advanced by him for complainant, in payment of certain ground rents. That in May, 1826, he mortgaged the same property to *Thomas A. Norris*, (the other appellee,) for the sum of \$800, which debt he has since reduced to \$400. That the said *Charles G.* gave his notes to *Norris* for the amount; and then, on the 21st of June, 1826, taking advantage of his infirmities and necessities, induced complainant to execute to him an absolute deed for the property, without any other, or fur-



ther consideration, than what is already mentioned; and which is much below the actual value of the property. That complainant however, refused to execute the deed, until the grantee (the said *Charles*,) signed a paper, sufficiently showing, that although absolute in its terms, it was only intended to operate as a mortgage. That nevertheless, the said *Charles* now insists upon holding said property as his own, and denies the right of complainant to redeem the same, or to recognize any interest in him thereto. *Prayer*, that the deed of the 21st of June, 1826, may be decreed to be what it was designed to be, a mere security for the payment of money; that the mortgaged premises may be sold; and an account taken of the rents and profits received by the defendant, *Hicks*. That the sums really due him and *Norris*, may be paid out of the proceeds thereof; the residue to the complainant, and for general relief.

The answer of *Charles G. Hicks*, denied that he ever loaned complainant money at usurious interest, but that in the year 1818, and from time to time, for several years afterwards, he advanced for his accommodation divers sums of money, and was also in the habit of selling him a variety of articles, and that during all this period, they were accustomed to liquidate their accounts, at the end of each year, including interest upon his advances, for the accommodation of the complainant, at the rate of six *per cent. per annum*, and for the balance so found due him, he was in the habit of taking complainant's note, bearing legal interest. That at the end of each succeeding year, they settled in the same manner, when the old note would be given up, and a new one taken for the whole balance then due. By adjustments of their accounts in this way, the claim of this defendant was justly increased from time to time, until the year 1824, when the amount being considerable, he pressed for security, and the complainant agreed to give him the mortgage spoken of in the bill, payable in two years,

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when the whole amount due him, with interest added to that time was \$1244 32, and the mortgage was accordingly executed. That at the expiration of the two years, the whole of the mortgaged debt being due, except the small sum of \$160 36, which was paid at the time of its execution; and the sum of \$400 being due in the mortgage to *Norris*, the complainant, in the month of June, in the year 1826, proposed to sell this defendant his equity of redemption in the said mortgaged premises, in consideration of his paying the debt to *Norris*, and advancing the complainant some hundred or two dollars, in addition to the debt due from him to the defendant, on mortgage as aforesaid—and the defendant consenting thereto, the deed of the 21st of June, 1826, was accordingly executed, and delivered to him by the complainant. That subsequently being urged so to do by the complainant, he agreed to sell him the same property at any period within two years, for the same consideration as is mentioned in the deed last referred to, and in the meantime, that he should remain in possession as defendant's tenant, at a rent of \$125 per annum, and a paper to that effect was signed by him. The answer denies that this latter contract had any thing to do with the deed from complainant, or formed any part of the consideration for the execution of the same; or that complainant refused to sign said deed, unless the defendant would give him a written acknowledgment, that it was to be regarded as only a mortgage. The answer on the contrary avers, that there never was such a contract written or oral. The answer also denies that defendant took advantage of the necessities and infirmities of the complainant, or that the consideration for the property was inadequate. It further states, that on the 24th of August, 1826, the complainant finding that he should not be able to repurchase the property, released his right to do so, and signed and delivered to defendant a paper to that effect, and delivered him the entire possession; since when, the defendant has held and enjoyed the undisturbed possession thereof, and has considered himself the

unqualified owner of the same. *Norris* by his answer admits the payment by *Charles G. Hicks* to him, of the \$400 due on his mortgage from complainant. The deed of the 21st of June, 1826, which is exhibited with the bill, recites the mortgage of the 8th of April, 1824, from the complainant to *Charles G. Hicks*, and that the debt therein mentioned is due and unpaid, to wit, the sum of \$1244 32, and that in consideration thereof, complainant had agreed to sell and convey absolutely to defendant, the mortgaged premises, subject to the payment by him, of the debt to *Norris*, &c. By the terms of this deed, the complainant conveys to the defendant *Hicks*, an absolute fee simple estate in the property in controversy.

The paper signed by the defendant, on the day of the execution of the above deed, is in these words:—“1826, June 21st. I do agree with *Elijah Hicks*, that at the end of two years from this date, by *Elijah Hicks*, or his heirs, paying to *Charles G. Hicks* or his heirs, the sum mentioned in the deed; the said *Charles G. Hicks*, or his heirs, is to execute a deed to the said *Elijah Hicks* or his heirs, on the property contained in the said deed.” “N. B. The said *Elijah* is to pay *Charles* \$125 per year.”

One of the exhibits filed with the answer, is the release of the complainant of the 24th of August, 1826. It is as follows:—“I release all my right and claim of the house in town, that I have deeded to *Charles G. Hicks*, and give him possession.”

Proof was taken under a commission, but it is so far adverted to in the opinion of the Chancellor, and of this court, as to render its introduction by the reporters unnecessary.

BLAND, Chancellor, (March Term, 1830.)

The second mortgagee, *Thomas A. Norris*, has been made a defendant, but as he has by his answer acknowledged himself satisfied, and disclaims all further interest in this

controversy, I shall, in the observations I have to make upon this case, pass him by as if he were in fact no party to it.

There can be no doubt, that these parties, *Elijah* and *Charles*, at one time stood in the relation to each other of mortgagor and mortgagee; but on the 21st of June, 1826, with a full knowledge of their situation, they put an end to that relationship, and by the express terms of several instruments of writing, and their unequivocal acts, assumed the position towards each other, of vendor and vendee, with a condition to re-convey, on the payment of a specified sum of money, within a certain time. It appears that they met together, for the purpose of adjusting the claim of the defendant, *Charles*, upon the plaintiff, which was then secured, by a mortgage upon a house and lot, in the city of *Baltimore*, which the plaintiff had subsequently mortgaged to *Thomas A. Norris*, to whom there was then due the sum of \$400, and after much conversation upon the subject, the deed of the 21st of June, 1826, was voluntarily and deliberately executed and delivered, which deed recites, &c.; and on the same day and time, or very soon after the delivery of the said deed, another instrument of writing was executed, and delivered by the defendant *Charles*, to the plaintiff, in these words:—"1826, June 21st.—I do agree with *Elijah Hicks*, that at the end of two years from this date, by *Elijah Hicks*, or his heirs, paying to *Charles G. Hicks*, or his heirs, the sum mentioned in the deed, the said *Charles G. Hicks*, or his heirs, is to execute a deed to the said *Elijah Hicks*, or his heirs, on the property contained in said deed."—"N. B. The said *Elijah Hicks* is to pay *Charles* \$125 per year."

The plaintiff then had possession of the property, but on the 24th of August, following, he executed and delivered an instrument of writing to the defendant *Charles*, which is in these words: "I release all my right and claim of the house in town, that I have deeded to *Charles G. Hicks*, and give him possession"—and at the same time, or soon after,



gave up the entire possession of the property to the defendant, *Charles G. Hicks*.

Considering the contract between these parties, as thus manifested by their acts and writings, it can only be regarded as a conditional sale, and not as a mortgage; since it is clear, that they intended to make a substantial alteration in the contract, which had, until then, subsisted between them; to put an end to it as a mortgage, and to make it in all respects an absolute sale, saving only to the vendor a power to re-purchase within two years, on the re-payment of the purchase money, without its being reciprocated by any covenant or obligation, upon which the defendant *Charles*, could sue for, and recover the amount which he had advanced, and thus divesting it of the principal and necessary characteristic of a mortgage.

But it has been urged, that the plaintiff was imposed upon and defrauded. The bill charges, that the deed of the 21st of June, 1826, was only intended as a mortgage. That the defendant *Charles* took advantage of the necessitous situation, and infirmities of the plaintiff, and of the situation in which they stood. That the property is worth infinitely more money than the whole amount of that, which by his last contract was stipulated by the defendant, *Charles*, to be paid for it, and that it was worth at least, \$2000. All which is denied by the answer of *Charles G. Hicks*, and there is no proof which at all sustains the bill in opposition to that answer, except as to the value of the property. The plaintiff may have been without a sufficiency of money, or property, to pay all his just debts, and so far in a necessitous situation; but there is nothing in this case, which shows that the circumstances of poverty were so brought to bear upon him, or were then so urgently pressing upon his mind, as to prevent or overrule the sound and fair exercise of his judgment. It is charged that the defendant, *Charles*, took advantage of the plaintiff's infirmities. It is presumed that the plaintiff, by this allegation, alludes to some mental infirmity, with which he was then afflicted;

because it is well known, that this court only interposes to prevent those who are intellectually imbecile, from being taken advantage of, by having their weakness in that respect fraudulently practised upon; but never interferes with the mere bad bargains of men of sound and free minds. There is no explanation to be found, either in the pleadings, or in the testimony, of what is exactly meant by the plaintiff's infirmities, as thus spoken of. Whether he was subject to any constitutional, bodily, or mental infirmity of a general or periodical nature, or whether his infirmity originated from his own vicious habits, or from any other cause; nor is there any evidence of his having been at that, or any other time afflicted with any mental imbecility whatever. It is true, that gross inadequacy of consideration may be an evidence of fraud, yet that will not itself, and alone, be deemed a sufficient ground on which to pronounce any contract void, which has been made freely, and without mistake, between parties of sound mind. But although it may be admitted that this plaintiff has not made so advantageous a bargain as he might have done, yet there is no evidence of fraud or mistake.

It has been mainly urged, that the contract between the parties must be considered as a mortgage, and not as a conditional sale. In cases of this kind every thing depends upon what shall be deemed the intention of the parties. Where there are several distinct instruments of writing relating to the same subject, they must be all taken together, and the contract deduced from a fair construction of the whole; and evidence *dehors* the writing may be let in, not as a means of explaining, or construing them, but to show what was the real and true character of the whole contract; and if it appears to have been intended only as a mortgage security, the right of redemption will not be allowed to be fettered by any conditions disadvantageous to the mortgagor. If on the other hand, it is shewn to be an absolute sale, it will not be converted into a mortgage, merely because of a stipulation to re-convey, on the re-payment of the purchase money, within a certain time.

To constitute the relation of mortgagor, and mortgagee, it is essential that their remedies should be in all respects mutual. The one should have a right to redeem, and the other to foreclose, or sue for his money. For where an estate has been absolutely conveyed, there could be no equity in leaving it to be held at the risk of one party, and allowing the other whenever he thought proper, to treat it as a mortgage, and come for redemption, when the other party had no remedy for his money, which he could not sue for without a covenant to repay. 2 *Freem.* 70, 86, 144, 153. 1 *Vern.* 191, 268. 1 *P. Wms.* 269. *Forres.* 62. *Sel. Cas. in Ch.* 10. 2 *Cha. Rep.* 275. *Pre. Chan.* 95, 423. 2 *Atk.* 495. 3 *Atk.* 389. 2 *Sch. and Lef.* 393. 19 *Ves.* 413. 3 *Swan.* 631. *Co. Litt.* 205, no. 1. 1 *Wash.* 15, 125. 1 *Call.* 280. 2 *Call.* 521. 2 *Mun.* 40. 4 *Mun.* 140. 1 *Rand.* 121. 7 *Cran.* 219.

Upon the whole, taking the several instruments of writing together, as furnishing the only safe and unequivocal evidence of the contract, which these parties, *Elijah* and *Charles*, intended to make, I feel satisfied that it can only be regarded as a conditional sale; there being no reciprocity of remedies—and the right to call for a reconveyance, on the repayment of the purchase money, having been released and abandoned, the sale must now be deemed perfect, final, and conclusive in all respects.

BILL DISMISSED WITH COSTS.

From this decree the complainant appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, STEPHEN, ARCHER, and DORSEY, J.

*Gill*, for the appellant contended.

1. That in April, 1824, the relation of mortgagor and mortgagee, existed between *Elijah* and *Charles G. Hicks*.
2. That up to 24th August, 1826, *Elijah Hicks* was in necessitous circumstances, and unable to pay *Charles G.*

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Hicks vs. Hicks and Norris.— 1832.

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*Hicks.* 3. That the property assigned to *Charles G. Hicks*, by *Elijah*, in June, 1826, was much more than sufficient to discharge the incumbrances upon it, including *Charles G. Hicks'* debt. 4. That *Charles G. Hicks*, when he took the absolute deed from *Elijah*, in June, 1826, then knowing his necessitous condition—that the property conveyed by it, was more than sufficient to pay all the claims upon it—giving a grossly inadequate consideration for the equity of redemption,—acknowledging still that *Elijah* had a right to redeem within a limited period,—having taken the release of the 24th August, without giving any consideration for that, must still be considered a mortgagee, and holding the property conveyed to him, merely as a security. 5. That where the relation of mortgagor and mortgagee is once clearly established, a court of equity will not permit the creditor to take advantage of that relation, and procure from his necessitous debtor an absolute assignment of his equity of redemption, of great value, either without very clear, full, and irresistible proof, that an actual sale was intended, or a fair and full consideration paid; but will look through all the dealings, and hold the parties, in the absence of such proof, to their original relations of debtor and creditor. 4. That in this case, the idea that a sale was contemplated, is rebutted by the absence of any consideration paid for the right of redemption—by the fact that the consideration recited in the assignments is not the true and real consideration; by the fact that the grantee did not go into immediate possession, nor the grantor agree to pay any rent. 7. That therefore the deed of June, 1826, was in equity a mortgage. 8. That *Elijah Hicks*, being obliged to come into a court of equity to have the deed of June, 1826, decreed a mortgage, the court will, as essential to the settlement of all claims between the parties, order the property to be sold, an account to be taken, and the mortgagor's debt paid. 9. That in this case, the answer of the defendant, being contradicted in material and substantial parts, is not to be considered as a bar to the relief sought, and comes within the rule, *falsus in uno, falsus in*



*omnibus*. 10. The bill being filed 23d May, 1828, and the right to redeem not expiring until 21st June, 1828, the complainant has not delayed asserting his rights so long, as to have forfeited the peculiar equities, which mortgagor's vending their right of redemption to mortgagees have, to impeach such sales when a full consideration has not been paid, and resume their original relations. He cited 4 *Kent's Com.* 137. *Manlove vs. Ball and Burton*, 2 *Vern.* 84. *Am. Ch. Dig. Tit. Mort.* 343, 4, 5. 4 *Mun.* 141. *Co. Lit.* 203, (b) no. 1. *Conway's Ex'rs vs. Alexander*, 7 *Cranch.* 236.

No counsel argued for the appellee.

EARLE, J., delivered the opinion of the court.

A principle was adverted to in the argument, which will be taken as the basis of a part of our opinion in this case, without recurring to the case of *Hicks vs. Cooke*, 4 *Dows. Par. Cases*, 16, where it seems to have been controverted. It is, that the mortgagee may become the purchaser of the equity of redemption, if he does not make use of his incumbency to influence the mortgagor to part with the estate, for less than its real value.

This principle we think was not infringed by *Charles G. Hicks*, in his purchase of *Elijah Hicks*, on the 21st of June, 1826. The mortgage money became due in April, 1826, and no steps to enforce payment, were either taken or menaced; nor were any indirect means used by him, that we can perceive, to influence the mortgagor to part with his equity of redemption. On the contrary, he appears to have entered into the agreement voluntarily, and uninfluenced by any consideration but that of parting with his estate for what he then supposed its value.

The purchase money was about \$1600, and whether the house and lot in the city of *Baltimore*, were at that time worth more, is not ascertained by the testimony. Three years after, the greater part of the witnesses estimate them to be worth from twenty-two to twenty-five hundred dollars, but all are silent as to the fluctuations in price of property so

situated, and none determined whether it increased or diminished in value. But let us suppose that the price was stationary, and the mortgaged premises were of the value of from twenty to twenty-five hundred dollars, in the year 1826, yet in our view, the \$1600 given, would not be such an inadequacy of price, as to induce us, in the absence of corroborative proof, to fix on the transaction of sale, the character of unfair dealing. It is a circumstance to be weighed in the consideration of the subject, but it is not unsupported, to over-balance many others, that indicate an honest and fair negotiation between the parties.

Another ground taken in the argument was, that the instrument simultaneously executed with the absolute conveyance in the case, converted it into a mortgage, and that it should have been treated as such in the Court of Chancery.

That an instrument, or defeasance executed by the grantee, at the time of the absolute deed, for re-conveyance to the grantor, on his paying a sum of money, may constitute the transaction a mortgage, is undeniably true; but that such an instrument does not always operate that effect, is a proposition equally certain; 7 *Cranch*, 23. The character of the transaction must in every case depend on the inquiry, whether the contract is a security for the re-payment of money. If it is, the parties are in the relation of mortgagor and mortgagee; but if it is not, the transaction must take the stamp of a conditional sale. The transaction before us, we have examined with every possible attention, and we cannot discover any thing in it, that has the appearance of its being a security for the repayment of money, by *Elijah Hicks*, to *Charles G. Hicks*. On the contrary, we think it is very clear that the parties designed it to be a sale, on a condition to be performed by *Elijah Hicks* and his heirs; if not confining the performance to him and them. This is the language that both of them hold to the witnesses in the cause. *Charles G. Hicks* told *Joshua Gorsuch*, that if the money was refunded within the two years, he was bound to re-convey

the property to *Elijah Hicks* and his heirs, but he was under no obligation to make a deed to any other person; and *Elijah Hicks* informed *Abraham H. Price*, that the property was not to pass out of the family, but that if he, *Elijah*, could raise the money to pay for it, within two years, without a sale, that his brother *Charles* had consented to let him have it. And the instrument concurrently executed with the absolute deed, seems to countenance the same idea, and contains a provision that constitutes *Elijah Hicks* a tenant of the premises, at a rent of \$125 per annum. These stipulations, and further attendant circumstances that might be mentioned, are inconsistent with the interpretation insisted on by the appellant, and make it manifest to us, that a security for the repayment of money, was not contemplated by the parties, and that the transactions between them of the 21st of June, 1826, must be considered as a conditional sale by *Charles G. Hicks* to his brother.

DECREE AFFIRMED.

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**HENRY VINCENT HILL's Lessee vs. JOSEPH B. HILL, *et al.***  
*June, 1833.*

H, by his will made in 1794, devised to his "two daughters, E and T during their single lives, all the remainder of his land; and after their death or marriage, all the land this side of the branch, where I now live, I give to my grand-son O, to him, his heirs and assigns forever—And one negro boy Ralph, and in case of his death, to my grand-son V, and in case of his death, to my grand-son I, and in case of his death, to my grand-son B, and in case of his death, to my grand-daughter M." Upon the death of the testator, E and T entered. T married, and E died, when O entered, and continued in possession until his death—HELD, that the true construction of this will was, that as O was living at the time of the termination of the estate devised to E and T, he took an absolute estate in fee, and that the limitation over to V failed to take effect.

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Hill's Lessee vs. Hill, et al.—1833.

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APPEAL from *Prince George's County Court*.

This was an action of *Ejectment* commenced by the appellant against the appellees, on the 17th day of April, 1830, for an entire interest in several tracts of land lying in *Prince George's county*.

There was a *pro forma* judgment by the county court, upon a case stated, for the defendants, and the plaintiff appealed to the Court of Appeals.

The opinion pronounced by the judge of this court contained the following statement of the facts of the case :

The plaintiff claims title to the land in question, under a devise in the will of *Henry Hill*, dated the 28th March, 1794, which is in these words : "I give and bequeath to my two daughters *Elizabeth Hill* and *Teresa Ann Hill*, during their single lives, all the remainder of my land ; and after their death, or marriage, all the land this side of the branch, where I now live, I give to my grand-son, *Henry Oswald Hill*, to him, his heirs and assigns forever, and one negro boy Ralph, and in case of his death, to my grand-son, *Henry Vincent Hill*, and in case of his death, to my grand-son, *John Hill*, and in case of his death, to my grand-son, *Benedict Joseph Hill*, and in case of his death, to my grand-daughter, *Mary Ann Gausa Hill*." Upon the death of the testator, *Elizabeth* and *Teresa Ann Hill* took possession of the premises. *Teresa Ann* married in the year 1801, which terminated her estate. *Elizabeth Hill* remained unmarried, and continued in possession until her death, which occurred in 1815 ; whereupon *Henry Oswald Hill* entered and continued in possession until August, 1827, when he died intestate, and without heirs of his body, leaving his brother, *Henry Vincent Hill*, (the lessor of the plaintiff,) and other brothers and sisters, who are defendants in the cause, his heirs at law ; having before his death, under the impression that he held an estate tail, conveyed the land to *William E. Kennedy*, and received a reconveyance with a view to dock the supposed estate tail.



The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

A. C. Magruder, for the appellant.

In the devise upon which the plaintiff founds his claim, there are words it is true, which *per se*, would give to H. O. H. an absolute fee simple. Other words would give to him, only an estate for life. If the words, “and his heirs or assigns forever,” had been omitted; if the devise had been to H. O. H., and in case of his death to the plaintiff in error, to the exclusion of the other brothers and sisters, then only an estate for life would have been given to H. O. H., not only because there were no words of inheritance super-added to the devise, but because the will in express terms would have given him an estate for life. “*In case of his death*,” must then mean *after* his death. The expressions, “to him and his assigns forever,” and “in case of his death,” to the plaintiff in error, are to be found in the same clause of the will, and are *there* to show the design of the testator in regard to the disposition after his own death, of the same land. Each expression is a part of the will, and each must be qualified, if any construction can be given to the clause, which will give a meaning to each, without violating any settled rule of law. If a fee simple be given to H. O. H. because of the words “and his heirs and assigns forever,” being added to the devise, then the subsequent clause must be expunged altogether. The estate then would go to H. O. H. and his children, if any; if none, to his brothers and sisters equally; when the subsequent words must have been introduced with a design, if H. O. H. died having no children, to give it to one brother to the exclusion of the other brothers and their sisters.

It is not contended that the intent of the testator may be gratified, by giving to H. O. H. an estate for life, and after his death, whether he leaves children or not, the land shall go to his brother. It is the manifest intent of the testator to give this estate to H. O. H. and his children, and descendants, so long as he has any, and the children of H. O.

*H.* as well as himself, are in any event to be preferred to the rest of the testator's descendants. Something more is intended than a mere life estate to the first taker, to be determined by his death. But an absolute fee to *H. O. H.*, an estate which, upon his death, intestate, and without children, would descend to all the grand-children of the testator, is forbidden by the subsequent member of the sentence directing in express terms, that the other grand-children shall have no interest in the estate, at least during the life of the plaintiff in error. The will gives to *H. O. H.* an estate in remainder, which vests in him, upon the death of the testator, and which he is to enjoy after the death of the sisters, to whom an estate, while they remained single, was given. This estate is to go to his children, if he has any, and will go to them whether *H. O. H.* die before or after his sisters. The descendants of *H. O. H.* are to be preferred to his brothers and sisters, or any of them, and it would defeat the clear intent of the testator to say, that unless *H. O. H.* outlived his sisters, that his heirs or children to whom the estate is to go after his death, are to be deprived of it altogether.

How then is every member of the devise to be gratified? By giving *H. O. H.* a fee, not absolute, but to be determined by his death, if he leave no children; and in the latter event, giving to the grand-son next named, (the plaintiff in error) the same estate in the land which had been previously given to *H. O. H.* And when the second grand-son died, if like the first, he died without having had children, then it is to go in like manner, to the third, and so on.

The testator did not mean to leave any part of his property undisposed of. The will shows the manner in which he designed to provide for his numerous descendants. To some of them he gives personal estate. To his two unmarried daughters he gives, in addition to personal estate, the family residence, and all the land around it, so long as they remain single, and no longer. Of the remainder of his estate in that place, he will not allow the law to dispose, because he evidently does not intend that his daughters, or any of their

descendants, shall take it so long as any one of the grandsons, named *Hill*, shall be alive, or shall leave descendants to take it, in preference to the daughters and their descendants. Even his grand-daughter, named *Hill*, is to be preferred to any married daughter, or the descendants of such daughter. There is to be in no event, a division of his estate among his grand-sons. So long as a grand-child can make title to the land under the will, so long shall such grand-child and his descendants be entitled to it, to the exclusion of every other branch of the family.

The words of the will indicate this to have been the intent of the testator, and such being his intent, there is no rule of law which says it shall not be effectuated. Cases on wills must be in every respect directly in point, and agree in every circumstance, or they will have little or no weight with the court, who look upon the intent of the testator as the polar star to direct them in the construction of wills. 3 *Wilson's Rep.* 141.

This being the case, we can derive from law books but little aid in the argument of this cause.

The cases in *Robinson vs. Robinson*, 1 *Burr. Rep.* 38. *Williamson vs. Daniel*, 12 *Wheat.* 568—and *Smith vs. Ball*, 6 *Peters*, 68, are authorities to show, that the words, "in case the said *H. O. H.* dies," &c. remain a part of the will, and serve to explain and limit and abridge the estate which the previous member of the sentence, *per se*, would have given to him. From the whole sentence, from every word used by the testator, his intention is to be collected. One portion of them, *per se*, would give an absolute fee; the other portion would give only an estate for life. Combine them, and give meaning and effect to all, and they manifest an intent to give *H. O. H.* an estate in fee, to be determined, however, and the same estate to go to the plaintiff in error, in the event of the former dying without having children. 4 *Kent Com.* 9, 10.

It is evident that the testator did not mean that *H. O. H.* should take an absolute estate, which upon his death intes-



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tate, was to descend to his heirs generally, and that only in the event of a failure of such heirs, was the second grandson to take. He could never die without *heirs*, while there lived either of his brothers, to whom, by the devise, the estate was to go in some event or other. It would be contrary to every known rule to interpolate words in order to create an estate tail, where, by creating such an estate, the declared object of the testator would be frustrated. Words must be supplied in order to give meaning to all the words used. "In case he die,"—this must not be construed to mean "whenever he dies," (children or no children)—upon or after his death, without any regard being paid to the words "his heirs and assigns forever,"—and certainly it is not to be supposed, that the testator is here speaking of death as a contingent event, which may, or may not happen. *Cambridge vs. Rous*, 8 Ves. 20. *Lord Douglass vs. Chalmer*, 2 Ib. 505.

No words can be introduced which the testator has not used, if the introduction of them would defeat his intention. We cannot then, introduce after, "in case he dies," the words "without heirs of his body," "leaving no heirs," "having no heirs," because thereby, the subsequent words would be rendered nugatory. Effect is given to the intent of the testator by the insertion of the words, "in case he should die, having *then* no issue"—"In case he should die without issue, and leaving the person to whom then, if at all, the estate is to go." If *H. O. H.* died without issue, leaving *H. V. H.* his brother. *Cro. James*, 590. An estate in fee, expressly given, cannot be reduced to an estate tail, by words no where to be found in the instrument.

The words here can never be tortured into a limitation, even after an indefinite failure of issue. The intent, as we contend is, that the plaintiff in error is to take the estate devised to him, *if he takes it at all*, when the first devisee dies, and no words are to be interpolated, which would defeat that intent.



2. It is further contended, that in order to give effect to the intention of the testator, the clause might be construed to give *H. O. H.* an estate for life, with remainder after his death to his *heirs*, thereby meaning his children, and that they would take as purchasers.

3. If the words of the clause taken in connexion do not give *H. O. H.* a determinable fee, then the latter member of the devise forbids him to claim more than an estate for life. "In case he dies," and as he is dead, we are entitled to the estate given to us. The subsequent words must be taken as an indication of a subsequent intention. 5 *Ves.* 247.

It may be said, that we cannot claim an estate in fee absolute or determinable, because in the devise to us, there are added no words of inheritance. To us it appears to be clearly the testator's meaning to give to the plaintiff in error when he can claim any interest, the same estate, which in the previous member of the devise was given to *H. O. H.* If in this we are mistaken, and we can claim only an estate for life, still the judgment of the court must be for us. It may be added, that if the estate given to us, be only an estate for life, then no matter what words are introduced after these, "in case he dies," the limitation over, cannot be too remote, although it would seem to depend upon an indefinite failure of issue. *Roe vs. Jeffrey*, 7 *D. and E.* 589. The limitation over must take effect, if at all, before the death of the plaintiff. We insist, that either *H. O. H.* took an estate for life, with a limitation over to his children, if any, as purchasers, or that the devise to him, was a devise of the fee determined by his death, without having had children. If either construction be correct, the judgment must be reversed.

*Taney*, (Att'y Gen'l *U. S.*) for the appellees.

The plaintiff cannot recover, unless *H. O. Hill* either took a life estate, or the limitation over to *H. V. Hill* is good, as an executory devise. And for that purpose it is necessary to interpolate the words, "dying without leaving issue at the time of his death."

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In ascertaining the intention of the testator, you are to look to the circumstances as they existed at the time the will was made, and not to future and unanticipated events. The primary intention of the testator was, that his property should descend to the issue of *H. O. Hill*, as long as there should be issue, and not until its failure, was it designed that *H. V. H.* should take. Upon the failure of the issue of *H. O.* he no doubt intended the estate should pass to the plaintiff, but this intention being contrary to the rules of law, cannot be gratified. It is an attempt to limit over a fee, after an indefinite failure of issue, which cannot be done. *Smith vs. Beall*, 6 *Peter's Rep.* 78, 79, 83.

If it was the intention of the testator to give *H. O. Hill* an estate tail general, that estate being by the act of 1786 converted into an estate in fee, there was nothing to limit over; but if there was, the entail is docked by the deeds.

The words used, are "his heirs and assigns for ever," and the use of the word "assigns," shows that he did not mean to limit his estate to his children in succession as purchasers.

It is perfectly apparent from the first member of the devise in question, that the testator intended to give *H. O. Hill* an estate in fee, and a contrary intention, as gathered from the following sentence, is merely conjectural.

The plain intention of a testator is not to be defeated by mere conjecture of a contrary intention. 2 *Fearne*, 427. When the testator says "in case of his death," he meant in case of his death, in his (the testator's) life-time, that being an intention consistent with the declared purpose of the previous clause. *Lord Douglass vs. Chalmer*, 2 *Ves. Jr.* 504, 506. *Cambridge vs. Rous*. 8 *Ib.* 12, 23, 24.

In this case, there is nothing from which we can suppose that the testator designed to reduce to a life estate, what he had, by the most ample words, constituted a fee simple. In construing the second clause of the devise some words must be inserted, and they should be such as do not conflict with the previously expressed intention of the testator. No case can be found, in which the word "heirs" in the

plural, has been held to be a word of purchase, a *fortiori*, the words "heirs and assigns for ever," cannot be so held.

It is said, you cannot interpolate words to reduce an estate in fee, to a fee tail general; but if this be so, you cannot do so, for the purpose of reducing an estate in fee simple absolute, to a conditional fee; and besides, it would require the interpolation of more words, to accomplish the latter purpose, than the former. *Newton vs. Griffith*, 1 *Harr. and Gill*, 111.

BUCHANAN, Ch. J., delivered the opinion of the court.

This suit is not for an undivided interest, as one of the heirs at law of *Henry Oswald Hill*, but for the entirety, under the limitation to *Henry Vincent Hill*, the lessor of the plaintiff, (in the language of the will,) *in case of the death of Henry Oswald Hill*, the first taker; and the question submitted is, what estate did *Henry Oswald Hill* take, and on what contingency was the limitation over to *Henry Vincent Hill* made to depend? Did *Henry Oswald Hill* take an estate in fee simple absolute; an estate for life, or such an estate as would before the law of descents of this State, have been an estate tail general; or a fee determinable on a contingency; and such as would render the limitation over to *Henry Vincent Hill*, good by way of executory devise?

It has not been contended in argument, that *Henry Oswald Hill* took an estate for life only; the words, "to him and his heirs and assigns for ever," with nothing so to restrict them, preclude such a construction; and they cannot be considered as revoked by any subsequent repugnant words, to be found in the devise. If he took a fee simple absolute, the limitation over was, upon acknowledged principles, clearly void, either as a remainder, or by way of executory devise, and nothing passed by it to *Henry Vincent Hill* as devisee, who could only take an undivided interest, as one of his heirs at law; and so, if he could be construed to have taken, what would have been an estate tail general, before the act to direct descents, such an es-

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tate, being by that act converted into a fee simple. *Newton vs. Griffith*, 1 *Harr. and Gill*, 111. But even if it were not so, and the limitation over could have operated as a contingent remainder, expectant upon the precedent particular estate tail, though not as an executory devise, the contingency on which it would have been made to depend, (an indefinite failure of issue) being too remote, yet that remainder would have been defeated by the deed, from *Henry Oswald Hill* to *William L. Kennedy*, and the re-conveyance to him, by which the supposed estate tail, on which it depended, would have been destroyed.

But an estate in fee simple being expressly given by the first clause of the devise, it cannot be reduced to an estate tail, by the interpolation of words no where to be found in the will; and if it could, it would be of no avail for the purpose of setting up a remainder, expectant upon such an estate tail, since by the law of descents of this State, what would before have been estates tail general, are converted into estates in fee simple; and seeing too, that if it were otherwise, and this could be construed into a devise of an estate tail to *Henry Oswald Hill*, that estate tail, and the remainder limited upon it, were both destroyed by his deed to *William L. Kennedy*, and the re-conveyance to him.

Is this then a devise of an estate in fee simple, determinable on any, and what contingency, upon the happening of which it was the intention of the testator, that the limitation over to *Henry Vincent Hill* should depend?

That there was some contingency in the mind of the testator seems manifest. The expression, "in case of," not meaning "at," or "upon," but having the same signification with the word "if." To construe it therefore, as referring to the death of *Henry Oswald Hill* generally, and meaning *upon his death*, or *whenever it might happen*, would be to reject the contingent or conditional words, and to introduce words of an absolute signification, which can only be done, where it is necessary to give effect to the obvious intent, which is not the case here; but on the contrary,



would have the effect to defeat the intention of the testator; as such limitation over would be void, either as a contingent remainder, or an executory devise. And as it cannot be supposed, that he meant to speak of the death alone of *Henry Oswald Hill*, (a thing certain) as a contingent event that might or might not happen, we are put to inquire, what the contemplated contingency was.

It could not have been a dying without heirs generally, as the persons selected as devisees over, and who could only take as such after his death, are themselves his heirs, and could never have taken at all under the devise; since, so long as they lived, the contingency upon which alone the limitations over to them were to take effect, (that is, the death of *Henry Oswald Hill* without heirs,) could not happen. But if that was the contingency intended, and had been so expressed, and the immediate limitation over had been to a person who could not have been an heir of *Henry Oswald Hill*, it could not have taken effect. It would have been void as a contingent remainder, being after a fee simple; and could not have operated by way of executory devise, the event (the dying of *Henry Oswald Hill* without heirs) being a contingency too remote to support it. If the contingency intended, was the dying of *Henry Oswald Hill* without issue, children or heirs of his body generally, it would be nugatory; since, where an estate in fee simple is expressly given, it cannot be converted into an estate in tail, by the introduction of words not to be found in the will. And if that intention had been expressed, the limitation over could not have been carried into effect. Not as an executory devise, which cannot be limited upon an indefinite failure of issue, as that would be; nor as a contingent remainder expectant upon an estate tail, under the operation of the law of descents of this State, making what would before have been an estate tail general, an estate in fee simple.

But it has been urged in argument, that as the testator could not have meant the death of *Henry Oswald Hill*,

without heirs generally, seeing that he could not die without heirs, so long as either of the devisees over, or the issue of any of them should be alive; and as by the words, "his heirs and assigns for ever," he intended that he should take more than an estate for life, he must have designed to provide for his children; and meant to give him an estate in fee, determinable on his dying without *children*, or *issue of his body living at the time of his death*; and that the devise must be construed, and the same effect given to it, as if immediately after the words, "in case of his death," the words, "*without children, or issue of his body living at the time of his death*," had been added. That may have been his intention; but if it were, *quod voluit, non dixit*. It is true, the intent of the testator, when it can be ascertained from the whole context of the will, is to prevail, if consistently with the rules of law, it can. But that intent, if not directly expressed, must plainly and clearly appear; it should be an intent plainly to be gathered from the whole will, and clearly showing the sense, in which expressions, otherwise doubtful, were meant to be used, and to what they were intended to be applied. And when the meaning of the terms used, the sense in which the testator used them, is plainly seen, the omission of express words of a corresponding meaning may be supplied; which is to give effect to the plain intention of the testator gathered from the whole will, by means of the terms used. If we were to fish for the intention of this testator, we might suppose that he meant *the death of Henry Oswald Hill, without issue of his body, living at the time of his death*, in order to give effect to the limitation over, by way of executory devise; on the ground that he must have intended to make provision for the children of *Henry Oswald Hill*, if he should have any. But, can we find that to have been the clear and plain intention of the testator; the necessary sense (to be gathered from the whole will) in which, the terms employed were used? If we cannot, to introduce the words, "*without issue of his body living at the time of his*

*death*," (although perchance, it might correspond with his intention) would be, not to expound his will, but to make one for him. Guessing, though we might happen to guess right, will not do. If there was no event or period to which the words, "in case of his death," could be applied, as words of contingency, perhaps it would be most consonant to the rules of construction, and more safe to reject them altogether, as ambiguous, senseless and incapable of being carried into effect, than to introduce the words of contingency proposed. Without ascribing to the testator something of technical learning, a knowledge of the difference between a *definite* and an *indefinite* failure of issue ;" and the effect and operation of a limitation over upon one, or the other, we have no means of determining which contingency he intended, if either. He may have meant the death of *Henry Oswald Hill*, without issue of his body living at the time of his death, or, if he intended either, he may have meant without issue of his body generally, which would seem to be the most natural to an unskilful man, not knowing the necessity of confining it to the failure of issue, at the time of the death of the first taker, in order to give effect to the limitation over, or he may have meant neither. And if there was any other contingency that might have been in the mind of the testator, to which the terms used aptly refer, as it is to be presumed that he understood what he said, and meant what his words most nearly and naturally import, in the place where they are found, and in relation to the subject to which they are applied, in the absence of any thing expressed, to explain them, and clearly showing a different intention, that should be taken to be the contingency contemplated ; instead of searching through the will for the intention, and when supposed to be discovered from the context, and not from the expressions employed, introducing words expressive of what the terms used do not import. And surely the words here used, ("in case of his death,") cannot of themselves, by any construction mean, *a dying by the devisee without issue of his body*



*living at the time of his death*; though they may refer to the contingency of his being dead, at the period of the termination of the precedent estate, given to *Elizabeth* and *Teresa Ann Hill*. And if it may have been the intention of the testator, to give to *Henry Oswald Hill* an estate in fee simple absolute, if he should be living, or in the event of his being alive at that time, when he contemplated the vesting of the estate under the limitation over to him, and the expressions used are such, as, standing alone and unexplained, indicate that intention, his death at that period must be taken to have been the contingency in the mind of the testator, unless there is something manifesting that he looked to a different contingency. What is there then to show that such could not have been, or was not his intention, and that he must have had some other contingency in his mind? It is not, we think, to be found in the supposition, that he must have intended to provide for the children of *Henry Oswald Hill*, or because no reason is shown why they should not have been provided for. It does not appear that he had any children at that time, and the presumption is, that he had none, as he left no issue at the time of his death, and therefore the attention of the testator may not have been drawn to the contingency of his having children.

But if he had, it does not follow that they must have been the dearest objects of the testator's benevolence. They would have been his great grand-children, and he may well have preferred his grand-children, the immediate devisees over in succession. It was a matter resting in feeling, and he certainly had his preferences; and when he intended to give an estate in absolute fee, he knew how to do it. He had previously, in another clause of his will, given such an estate to another grand-son, *Henry Hill*, in his own language, "to him, his heirs, and assigns for ever," with no precedent life estate, but to vest immediately upon his own death.



It is clear too, that he preferred his grand-son *Henry Oswald Hill*, to other grand children, to whom there are limitations over of the land devised to him, and the circumstance, that the devise to him was after a precedent life estate to *Elizabeth* and *Teresa Ann Hill*, whom he might not survive, may perhaps account for the introduction of the words of contingency, "and in case of his death," and the consequent limitations over to *Henry Vincent Hill*, &c. as the next objects of his bounty, in preference to any children that *Henry Oswald Hill* might have. But the devise to him being in the first instance, in the same words with the devise to *Henry Hill* of other lands, ("to him, his heirs, and assigns for ever,") it would seem as if he intended to give to him the same estate, (an absolute fee) in the event of his being alive to take it, on the termination of the precedent life estate; and if not, then that it should go over; and under that construction, if *Henry Oswald Hill* had died before the termination of the preceding life estate, the limitations over would have had the same operation, as if they had taken effect by way of executory devise.

If instead of the words, "and in case of his death," the language of the testator had been, "if he be dead," or, "if he should be dead," it would in the absence of any thing to explain it, and to show that it referred to some other contingency, obviously have referred to the contingency of *Henry Oswald Hill's* death, at the termination of the preceding life estate. It would have been equivalent to his having said, "and if he should then be dead," that is, at the termination of the precedent estate. And the words, "and in case of his death," viewed in connexion with the preceding devise of an estate for life, upon the termination of which the devise to *Henry Oswald Hill* was to take effect, are synonymous terms; and standing where they do, and applied to the subject in relation to which they are used, the time at which the devise to *Henry Oswald Hill* was to take effect, marks the period to which they refer; nothing appearing to explain them, or to show that they

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point to a different contingency. And as the language of the testator imports only, what *may* have been his intention, there being nothing evincing a different intention, he must be understood to have meant what his language most nearly imports.

We think, therefore, that as *Henry Oswald Hill* was living at the time of the termination of the estate devised to *Elizabeth* and *Teresa Ann Hill*, he took an absolute estate in fee, and that the limitation over to *Henry Vincent Hill* failed to take effect.

JUDGMENT AFFIRMED.

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ZADOCK SASSCER vs. WILLIAM WALKER'S EX'RS.—  
*June, 1833.*

The executors of W obtained a judgment against K, from which he appealed, and gave a bond with S as his surety. This judgment being affirmed, a suit was afterwards brought upon the appeal bond, against K and S. The writ in the latter case was in the *detinet* only, and the plaintiffs therein were styled "executors of the testament and last will of W, deceased." In the declaration which recited the writ, the plaintiffs without being named, were styled throughout, "the said plaintiffs." In the replication assigning breaches, the plaintiffs styled themselves executors, &c. To the replication there was a rejoinder, and to that, a general demurrer by the plaintiffs. HELD, that the words, "the said plaintiffs," in the declaration must be understood, as having reference to the plaintiffs as described in the writ, and that the contract sued on, being one on which the plaintiffs could maintain an action in their representative characters, there was no error in the pleadings.

Where a plaintiff sues upon a contract on which he can only maintain an action in his individual right, if he is described with the addition of executor in the writ, &c., this may be treated as a superfluous description, and not irregular, the demand being the same.

Where the writ is in the *detinet* only, the plaintiff suing on a contract in his own right, this, since the *Stat. of 4 and 5 Ann, ch. 16*, cannot be taken advantage of upon general demurrer.

Wherever the money recovered would be assets in the hands of an executor, plaintiff, he may sue in his representative character, though, from the form of the contract he might also sue in his own right.

The money recovered upon an appeal bond given to the obligees as executors, on an appeal from a judgment obtained by them in that character, will be assets in their hands.

The mere taking property under a *fieri facias*, is not of itself equivalent to payment, and does not amount to satisfaction of the judgment. And a plaintiff may countermand a *venditioni exponas*, and at the instance and for the accommodation of the defendant, restore the property levied upon under a *fieri facias*, without being actually paid, and without impairing his claim.

The plaintiff in a judgment at law, may proceed at one and the same time, with a *fi. fa.* upon his judgment, and by suit upon an appeal bond, to enforce payment of the same claim.

In an action upon a bond with a collateral condition, where judgment is rendered upon demurrer, after assignment of breaches, for the plaintiff, a jury of inquiry ought to be sworn to assess the damages, and it is error in the County Court to enter a final judgment without such assessment.

But since the act of 1825, *ch. 117, sec. 1*, it not appearing by the record, that any point or question relating to, or involved in the final judgment, was presented to, and decided by the County Court, that error cannot be noticed by this court.

A motion in arrest of judgment presents the question whether any judgment should be rendered.

#### APPEAL from *Prince George's County Court*.

This was an action of *Debt*, instituted by the appellees, against the appellant and *James Kemp*, on the 12th of June, 1827, in an appeal bond, dated June the 13th, 1823, in the penalty of \$850, in which *Kemp* was the principal, and the appellant his surety.

The judgment of the County Court on the demurrer being for the plaintiffs, the defendant, *Sasscer*, brought the record by appeal to this court.

His honor, the chief judge, who delivered the opinion of the Court of Appeals, stated the pleadings as follows :

The appellees, as executors of *William Walker*, having recovered a judgment in *Prince George's County Court* against *James Kemp*, there was an appeal to this court by *Kemp*, with *Zadock Sasscer* as his surety in the appeal bond. That judgment was affirmed by this court, and a *fieri facias* was sued out, which was returned by the sheriff, "levied as per schedule, and not sold for want of

bidders." Whereupon a *venditioni exponas* was issued, which was returned by the sheriff, "not sold by order of the plaintiffs." A suit was afterwards instituted by the appellees upon the appeal bond, against *Kemp*, and *Sasscer* his surety, which is brought up upon appeal by *Sasscer* alone. In the writ, which is in the *detinet* only, the appellees are styled, "executors of the testament and last will of *William Walker* deceased." In the declaration which recites the writ, the appellees without being named, are styled throughout, "the said plaintiffs," and in their replication (to the plea of general performance,) assigning breaches, they style themselves "executors, &c." In the rejoinder, the *feri facias* that was sued out, upon the former judgment against *Kemp*, with the *venditioni exponas*, and the sheriff's return upon each, are pleaded in bar to the action. To this rejoinder there is a general demurrer, and judgment on the demurrer for the appellees.

The cause was submitted on notes to BUCHANAN, Ch. J., MARTIN, ARCHER, and DORSEY, J.

*Mundell*, and *Stonestreet*, for the appellant.

1. The appellees, the plaintiffs below, having entered a general demurrer to the defendant's rejoinder, the judgment of the County Court should have been for the defendants, the first error in the pleading, having been committed by the plaintiffs. The suit was instituted by the plaintiffs, as executors of *William Walker*; yet the declaration states the bond declared on, to have been executed to the plaintiffs, in their individual capacity. To this, the defendants pleaded performance, and the plaintiffs reply in their capacity of executors; alleging, as a breach, that the judgment mentioned in the condition of the bond, and which had been obtained by the plaintiffs as executors of *William Walker*, had been affirmed by the Court of Appeals, &c. To this the defendants rejoined, as set forth in the record, and to their rejoinder, there was a general demurrer by the plaintiffs.



The appellants contend, even if it should be conceded, that the rejoinder was not sufficient in law to sustain the issue on their part, still, the judgment should not have been against them, when the plaintiffs had previously committed so many errors, and departures in pleading. The suit had been brought by the plaintiffs in their capacity of executors, and yet, they declare on a bond executed to them in their individual capacity. For although they are described in the bond, as executors of *Walker*, still it was in fact, given to them in their individual capacity, and their being mentioned as executors, could only be considered as *descriptio personæ*, and they have declared on it in their own right. To the plea of performance, they came back again in the replication to their starting position, and reply as executors.

2. But the rejoinder of the defendants was sufficient in law.

The allegation contained therein, that the sheriff had returned the *venditioni exponas*, “not sold by order of plaintiffs,” was sufficient for that purpose. When property is taken by the sheriff to satisfy a debt, it is his bounden duty to proceed to sell, and he is answerable for the property until it is sold. He has a qualified interest in it, until he can sell; and the very moment the plaintiff directs the sheriff to return the property, or stops him in the legal discharge of his duty, without the positive assent of the defendant, by interfering and directing property levied on, not to be sold, the law will raise a presumption, that the debt has been satisfied. For such an order operates to release the sheriff from all liability for the property taken; and of course, if the defendant had given no assent thereto, it must release him from all further liability for the debt.

*A. C. Magruder*, for the appellee.

The first error in the declaration, it is alleged, consists in this; that the suit was instituted by the plaintiffs, “as executors of *William Walker*.” With respect to this objection, it might well be questioned, whether the plaintiffs below

had not a right to sue as *executors*. The bond was given to them as executors, and could only be given to them in that character. It was to remove a judgment obtained by them as executors, and the amount of which, whenever recovered, whether upon the appeal bond, or on the original judgment, constitutes a part of the assets of the estate of their intestate. The most that can be said of it, is, that it is a superfluous description, and not an error which the law will notice. 1 *Chitty Plead.* 252.

2. The condition of the bond sued on has not been performed, as is admitted by the rejoinder; why then have the plaintiffs no remedy upon it? Unquestionably, the law gave them a right to put it in suit, *eo instanti*, the judgment was affirmed. They might also issue an execution on the judgment, which they have done, and the question is, does the exercise of this latter right deprive them of their remedy on the bond? The plaintiffs certainly could not recover the money twice, and a sale of the property would have been a payment *pro tanto* of the claim. The return of the sheriff however, is not evidence of payment of any part of it, and is not pleaded as a payment. Even if the sheriff had actually made the money, after the institution of the suit upon the bond, it might have been relied on to show, that we were only entitled to nominal damages, not that the defendants were entitled to a judgment for costs.

A party may at the same time sue on an injunction and appeal bond, relative to the same claim. The plaintiff does not claim the same thing in his action, and under his execution. In the former, he claims damages for the breach of the condition of the bond. The notion is, that the party has an election, either to issue an execution, or sue upon the appeal bond, and must elect between the two remedies; and that the election of the one, is the abandonment of the other. It will not do to say, that the remedy by action on the bond is not gone, but is only suspended. "A thing or action personal once suspended, is for ever suspended. *Jacob's Law. Dic.* title suspensions. *Croke Chas.* 373.

A mortgagee may at the same time, proceed in ejectment to recover the land, and upon the bond to recover the mortgage debt. So in this case, the plaintiffs had a right to their execution for the debt and costs, and to his action on the appeal bond to recover *damages*, for not prosecuting the appeal with effect. *Southcote vs. Braithwaite*, 1 Term. Rep. 624. *Perkins vs. Pettit and Yale*, 2 Bos. and Pul. 440.

BUCHANAN, Ch. J., delivered the opinion of the court.

The record submitted to us, presents this case, *vide statement*, ante p. 103. Which, then, committed the first fault in pleading, is an inquiry, thrown upon us by the demurrer.

The appellees being styled in the writ, "executors of *William Walker*," and merely called in the declaration, (after reciting the writ,) "the said plaintiffs," the words "the said plaintiffs," in the declaration, must be understood, as having reference to the plaintiffs as described in the writ, and to mean the plaintiffs, executors of *William Walker*; and being called in the replication throughout "executors of *William Walker*," and in the demurrer "the said plaintiffs," as in the declaration, which must be understood in the same manner as the declaration, there is perfect correspondence, between the writ, declaration, replication, and demurrer; and if the appeal bond on which the suit was brought, and which was given to them as executors, on the appeal from the judgment obtained by them in that character against *Kemp*, was a contract on which they could sustain an action only in their individual, and not in their representative capacity, then the addition of the word "executors," in the writ, &c. might be construed and treated as a superfluous description, and not irregular, the demand being the same. 1 Chitty Pl. 253. *Lloyd vs. Williams*, 2 Wm. Black, 722. *Rogers vs. Jenkins*, 1 Bos. and Pul. 383. 384. *King and others vs. Thorn*. 1 Term. Rep. 266 (488.) 1 Vern. 119. 6. Com. Dig. 307, Title Pleader. And though where a plaintiff sues on a

contract in his own right, if the writ be in the *detinet* only, it is irregular, yet since the statute 4 & 5 *Anne* 16, it cannot be taken advantage of on a general demurrer. 6 *Com. Dig.* 306. *Title Pleader*. The appellees, however, were not bound to sue in their individual character, but had a right to sue in either their individual or representative capacity. Wherever the money when recovered, would be assets in the hands of the executor, he may sue in his representative capacity. 5 *Co. Rep.* 31. *King and others vs. Thorn*. 1 *Term. Rep.* 265, (487.)

In *Hosier vs. Lord Arundel*, 3 *Bos. and Pul.* 7, decided in the year 1802, a different notion seems to have been entertained; but afterwards in the year 1805, in *Cowell and wife vs. Watts*, 6 *East.* 405, the court of *Kings Bench* returned to the old rule, "that where money when recovered would be assets, the executor may declare for it in his representative character," accompanied by an expression of regret, that it had ever been departed from. And the same rule is recognized, and treated as settled law, in 1 *Saunders Pl. and Ev.* 610, &c.

The bond upon which this suit was brought, being given to the appellees as the executors of *William Walker's* will, on an appeal from a judgment obtained by them in that character against *Kemp*, the money when recovered, will be assets their hands. They had a right therefore to sue in their representative capacity; and considering this suit as brought in that character, it was properly brought.

We come then to the rejoinder, the matter of which is clearly no sufficient bar to the action. Every word of it may be true, (and which the demurrer admits,) and yet the appellees be entitled to recover. They were under no obligation to entitle them to proceed upon the appeal bond, to have issued a *fieri facias*, or *venditioni exponas*; and when issued, there was nothing to prevent their countermanding either of them, without impairing their right to put the appeal bond in suit.



The mere taking the property under the *feri facias*, was not itself equivalent to payment, and did not amount to a satisfaction of the judgment. The plaintiff might have countermanded the *venditioni exponas*, and restored the property at the instance, and for the accommodation of the defendant in the judgment, without having received payment of, or satisfaction for any part of it; and no payment, satisfaction or discharge is alleged in the rejoinder, which is no answer to the replication assigning the breaches of the condition of the bond; which was, that *Kemp*, the defendant in the judgment appealed from, should prosecute the appeal with effect, and in case the judgment should be affirmed, pay to the appellees, executors, &c. the debt, damages, &c. The condition of the bond, as the rejoinder admits, was not performed. The appeal was not prosecuted with effect, and the return of the sheriff did not amount to a payment, and satisfaction of the judgment according to the condition of the bond, and is not pleaded as such. If the appellees had taken issue on the rejoinder, the only matter referred to the jury would have been, whether a *feri facias*, and *venditioni exponas*, were issued and returned as alleged in the rejoinder, which may well have been, yet the judgment remained altogether unsatisfied, either in fact, or in contemplation of law. The demurrer therefore to the rejoinder in this case was properly sustained. In *Southcote vs. Braithwaite*, 1 Term. Rep. 624, it was decided that bail in error, could not surrender the principal, but were liable at all events, in case the judgment was affirmed, and not entitled to be relieved, though the principal became bankrupt pending the writ of error. And in *Perkins vs. Pettit and Yale*, 2 Bos. and Pul. 440, which was a much stronger case than this, it was held upon general demurrer to be perfectly clear, that if a defendant in error, upon the judgment being affirmed, take into execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance.

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But instead of swearing a jury of enquiry, which should have been done, on the demurrer to the rejoinder being ruled good; the court below proceeded to enter up a final judgment for the appellees, (the plaintiffs there,) which is clearly an error, for which the judgment would be reversed, were we not restrained by the act of 1825, *ch. 117, sec. 1*, which provides, that “the Court of Appeals shall not reverse any judgment, on any *point, or question, which shall not appear to have been presented to the County Court, and upon which that court may have rendered judgment*. And it does not appear that any *point or question* relating to, or involved in the final judgment was presented, and decided by the County Court. It is not like the case of *Charlotte Hall School vs. Greenwell*, 4 Gill & Johns. 407, where there was a motion in arrest of judgment, which presented to the court the question, whether any judgment should be rendered.

JUDGMENT AFFIRMED.

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ALPHEUS J. HYATT vs. HUGH BOYLE.—June 1833.

B sold H a quantity of tobacco, and delivered a bill of parcels, which described it as follows:—“24 kegs of tobacco, branded (*Parkin*) at four months, weighing, &c., at 13½ cents. B had received this tobacco for sale on commission—sold it, and guarantied the sale to his principal. The purchase was made at the plaintiff's counting room, where the tobacco was. It was branded, as stated in the bill of parcels, and not examined by either party prior to, or at the time of the sale. The price agreed for was a full price for a merchantable commodity; and the brand in question was a favorite one, always considered remarkably fine, though it fluctuated in price from 8 to 13½ cents per pound. The tobacco in part proved unsound, and none of it had been re-sold; the purchaser proposed to return that which was unmerchantable, and pay for the residue. In an action for the price, HELD, that there was no implied warranty of quality in this contract; that

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in relation to the quality of the tobacco, nothing was stipulated; and that the terms on the part of the vendor were complied with by the delivery of the tobacco, branded in conformity with the bill of parcels.

It is a general principle of the common law, that in sales of personal property, the seller is not answerable for any defects in the quality or condition of the article sold, without there is an express warranty or fraud.

The exception to this rule, that where there is no opportunity of inspection, the seller impliedly warrants the quality of the commodity sold, only applies to those cases, where the examination at the time of the sale is, morally speaking, impracticable; as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability.

Where there is a warranty of quality in the sale of a chattel, and an offer to return the goods purchased in due time, if the warranty is violated, the purchaser, in an action against him for the price, may defeat the action, whether the vendor knew of the defect of quality or not; for the *scienter* in such case is immaterial.

The case of *Osgood vs. Lewis*, 2 *Harris & Gill*, 495, explained, and *Thornton Winn*, 12 *Wheat*, 183, denied.

#### APPEAL from *Baltimore County Court*.

This was an action of *Assumpsit* commenced by the appellee, against the appellant and one *Seth Hyatt*, merchants, trading at *Washington*, under the firm of *Seth Hyatt & Co.* on the 24th of November, 1827. The appellant only, was taken upon the *capias*. Issue was joined upon the plea of *non-assumpsit*.

1. At the trial the plaintiff, *Boyle* proved that he sold and delivered to the defendants, a quantity of tobacco, on the 10th of December, 1825, and read in evidence to the jury, the following bill of parcels and letter :

“*Baltimore*, 10th of December, 1825. Messrs. *Seth Hyatt & Co.*—Bought of *Hugh Boyle*, 24 kegs tobacco, branded (*Parkin*) at 4 months :—the whole weighing nett 3543 pounds, at 13½ cents : \$478.31. Cash paid drayage, 50 cts. \$478.81.”

“Dear Sir :—Above you have invoice and bill of lading for 24 kegs manufactured tobacco, which I hope will arrive safe, and please. I have drawn on you for the balance due, which please honor, and oblige your obedient servant, *Hugh Boyle*.”

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And also read in evidence, by consent, the following statement:—" *Thomas Higinbotham* declares, that he sold the tobacco mentioned in the original bill of parcels, to one of the partners of the house of *S. Hyatt & Co.*, who came to the counting house of the plaintiff, to purchase the same. That this tobacco was in kegs, and had been consigned to the said *Boyle*, who sold the same on commission, and guaranteed the said sale to his principal; and that tobacco of the same brand from *Richmond*, had been frequently sold by plaintiff before, and since; and that no complaint had been made of its quality, or condition. That the tobacco was sent from *Boyle's* counting room, to the *Washington* packet. That the tobacco sold was *Parkin's crooked brand*, as stated in the bill of parcels, and was not examined by either party, prior to, or at the time of sale."

The defendants then proved, that upon the receipt of the tobacco by them, it was placed in a dry warehouse, and when received the kegs appeared to be in good order. That defendants are merchants in *Washington*, and bought the article to sell again, and that the plaintiff knew this fact; and also proved, that tobacco branded, *Parkin's crooked brand*, is a merchantable commodity, well known in the market among merchants, and that it varies in price, from 8 to 13½ cents per pound, according to the quality, and that the price agreed for in this case was a full price for first quality of *Parkin's crooked brand*. Defendants further proved, that no demand occurred for said tobacco after they received it, for about sixty days after the receipt, when one keg of it was sold to *Samuel Stetinius*, who opened it in the middle, as is the custom to open such an article. That it was then found to be unsound, rotten and unmerchantable, and was returned to said defendants. That an inspection of two other kegs immediately took place, and both proved equally unsound. That the brand of *Parkin's crooked brand* was a favorite brand, and always considered remarkably fine. That upon *Boyle's* drawing on defendant for the amount, they declined paying, and assigned as



a reason that the tobacco was injured. That about six months afterwards, the plaintiff came to *Washington*, and another keg was opened in his presence which proved to be tolerably good; immediately on which, the defendants offered to have all the rest opened, and to pay for all that were merchantable, and to return the rest, which the plaintiff refused. That the tobacco has always since been on hand, and has never been sold, or offered for sale by the defendants, but has been perfectly useless to them; that except the four kegs above mentioned, none other has been examined. The defendants also read the following letter from the plaintiff to them.

“*Baltimore, February 17th, 1826.* Messrs. *Seth Hyatt & Co.* Gentlemen,—Your respects of the 16th is this moment received,—I am surprised at its contents. I need not say, that I considered I was doing you a favor, by selling you that lot of tobacco at the time I did, but it was evident, as I had the same offer from another house, for the whole lot, and I gave you the preference, believing as I then did, it was your interest to have it.

I have sold more than 1000 kegs of that brand, and this is the first, I have ever heard complained of. Neither could you suppose for a moment, that I could now, after more than sixty days from the time it was purchased, and forty days after the sales were made out, and the accounts settled with the owner, have any thing to do with it. I would be exceedingly sorry that the purchase should turn out a bad one. I would at all times rather give you a good bargain than a bad one, but I cannot be accountable for this. Respectfully, &c. *Hugh Boyle.*”

And the defendant also proved, by a witness who did not read the letter of the 16th February, 1826, but who heard *Seth Hyatt*, while writing it, say, it contained a proposal to *Boyle*, to take back the tobacco; and on cross examination of *Higginbotham*, he stated, he did not believe there was an offer to return, but the lapse of time had been so great, he did not recollect.

The plaintiff then prayed the court to instruct the jury, that he was entitled to recover the whole amount of the purchase money.

*First*, because from the evidence in the cause, there was no warranty express, or implied, and the defendants, under the circumstances, took the tobacco at their risk.

*Secondly*, that there was no sufficient evidence to show that the defendants had ever offered to return the tobacco, and that if no offer was made to return the tobacco, the plaintiff is entitled to recover.

*Thirdly*, that there being no evidence to show fraud on the part of the plaintiff, and no evidence to show that the plaintiff had agreed to take back the property after the sale, the defence of warranty, even if there had been an implied one, cannot be set up in this action, it being an action to recover the price agreed upon for the goods. Upon this prayer the court (HANSON, A. J.,) said, that although there might be, in the opinion of the jury, evidence of an offer on the part of the defendants, to return the tobacco within a reasonable time, yet as there was no warranty constituted by the contract proved between the parties, the plaintiff is entitled to recover,—and also, even if the contract had contained a warranty, it was no defence, in an action to recover the value of the goods sold, unless the defendants tendered a return of them within a reasonable time, and the plaintiff knew of the unsoundness of the article—and directed the jury that the plaintiff was entitled to recover the full amount of the purchase money. The defendant excepted.

1. The plaintiff and defendants having given the evidence as stated in the first bill of exceptions, which it is agreed shall be part of this, the defendant prayed the opinion of the court to the jury, that in this case, there is evidence of a warranty, that the tobacco sold was merchantable, and that if the jury believe it was not merchantable at the time of its sale, the plaintiff is not entitled to recover for that part which was not merchantable at the time of sale.

2. If the jury believe, that the tobacco sold, at the time of sale was unmerchantable and unsound, and unfit for sale, and that the defendant at the time of sale, did not examine it, and within a reasonable time offered to return the whole of it, or such part as was unsound and unmerchantable, and the plaintiff refused to receive the same ; then the plaintiff is not entitled to recover for the unsound and unmerchantable tobacco, which was so at the time of sale. Both of which opinions the court refused to give.

The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Walsh*, for the appellant, contended,

1. That the bill of parcels connected with the other evidence, was in law a warranty, that the tobacco was merchantable, and that if it was not merchantable, it was a defence in this action. *Osgood vs. Lewis*, 2 *Harr. and Gill*, 495. The brand by which the tobacco was described was proved to be a great favorite, and to give the article a high value in the market. It was the same as though the bill of parcels had expressly asserted, that the article was fine and merchantable.

This brand, the evidence shows, enjoyed a high reputation in the market, in which the plaintiff resided. He must be presumed therefore, to have known it, and to have described the article by its brand, for the purpose of inducing the defendant to believe he was buying an article of good quality. *Bridge vs. Wain*, 2 *Serg. and Low*, 487. *Tye vs. Fynmore*, 3 *Camp. Rep.* 461.

2. There was evidence to go to the jury, that the appellant offered to return the tobacco, or such parts as were unmerchantable, and that the appellee refused to receive it. *Yates vs. Pym*, 6 *Taunt.* 447.

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3. There was an *implied* warranty, that the tobacco was merchantable, and that it would answer the purpose for which it was sold. The defendant was not bound to examine, as the brand, *per se*, imported it to be merchantable. 2 *Kent Com.* 247. It was known to plaintiff, that defendant purchased to sell, and therefore the former is to be considered as impliedly warranting that the article will answer the purpose contemplated. *Gray vs. Cox*, 10 *Serg. and Low.* 285. *Bluett vs. Osborne*, 2 *Ib.* 437. *Gardiner vs. Gray*, 4 *Camp. Rep.* 144.

And he insisted, that this defence is available in an action for the price of the goods, without proof of fraud on the part of the plaintiff. *Okell vs. Smith* 2 *Serg. and Low.* 317. *Johnston vs. Cope, et al.* 3 *Harr. and Johns.* 89.

*Gill*, for the appellee.

All manufactured tobacco is branded with the name of the maker, and such is the case with most other manufactured articles. This practice must be discontinued, if describing the article by the brand, is to be construed into a warranty. He contended, that the brand was attached as a mere description, and was no warranty. This action is to recover the price of goods sold and delivered, and not returned to the seller. If therefore there had been a warranty, the plaintiff must prevail; as to defeat the action, there must not only have been a return, or offer to return in a reasonable time, but it must be shown, that plaintiff knew of the unsoundness of the article; otherwise, the remedy of the vendee is upon the warranty. *Thornton vs. Wynn*, 12 *Wheat. Rep.* 185, 193.

The cases cited on the other side, were actions on the warranty by the vendee. 4 *Johns. Rep.* 421. *Bluett vs. Osborne*, 2 *Serg. and Low.* 437. *Sands and Crump vs. Taylor and Lovett*, 5 *Johns.* 395, 410. But in this case, there was no warranty expressed or implied. *Johnston vs. Cope, et al.* 3 *Harr. and Johns.* 89. The bill of parcels says nothing of the quality or condition of the goods. *Osgood*



and *Lewis*, 2 *Harr. and Gill*, 521, 523. All that the bill of parcels affirms, is the fact, that the tobacco was of a particular brand, and that was true.

*Johnson*, in reply.

1. The tobacco was expressly warranted to be merchantable, or at least, not to be unsound or rotten.

It is conceded, that it was to be of *Parkin's crooked brand*, and the delivery of an article corresponding only in name, with that sold, is not a compliance with the vendor's contract.

The article delivered must be substantially the same as that sold. The evidence shows, that tobacco branded as this was, is a fine and merchantable commodity.—Can a contract for the sale of such an article, be complied with by the delivery of an inferior, and unsound tobacco, because the *kegs* are branded with the right brand?

The tobacco should be proved to be of the make of *Parkins*, and to be of merchantable quality. *Gardiner vs. Gray*, 4 *Camp*. 144. *Osgood vs. Lewis*, 2 *Harr. and Gill*, 495. *Ib.* 524.

The intention of the parties was, the one to buy, and the other to sell, a saleable article—The defendant bought to sell again, and the plaintiff knew it. When plaintiff told defendant, he would sell him *Parkin's crooked brand*, he told him in effect, that he would sell him a merchantable tobacco. *He affirmed* it to be so, and that is equivalent to a warranty. *Ib.* 2 *Harr. and Gill*, 518.

2. But if the warranty was not express, it was implied. When a party buys for a particular purpose known to the vendor, the former has a right to expect a commodity that will answer the purpose contemplated. *Laing vs Fidgeon*, 6 *Taunt.* 108. *Tye vs. Fynmore*, 3 *Camp.* 461. *Okell vs. Smith*, 2 *Serg. and Low.* 316. *Davis vs. Noak*, *Ib.* 437.

If the vendor, to evade the effect of his implied warranty, relies upon the fact, that the vendee might have examined for himself, he must show affirmatively, that such an opportunity existed. 3 *Kent Com.* 374.

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3. The warranty, whether express or implied, is a defence to the present action, and defendant will not be driven to a cross suit. The doctrine in 12 *Wheat*, 185, would beget a circuitry of action, without the least necessity, and would be productive of injustice by subjecting an innocent defendant to the costs of the first action. Upon this point he referred to 2 *Saund. Pl. and Ev.* 917. 1 *Selw. N. P.* 149. (no) *Farnsworth vs. Garrard*, 1 *Camp.* 38. *Fisher vs. Samuda*, *Ib.* 190. *Payne vs. Whale*, 7 *East.* 274. *Basten vs. Butter*, *Ib.* 479. *Ib.* 482. 2 *Stark. Ev.* 641. *Miller vs. Smith*, 1 *Mason*, 437. *Taft vs. The Inhabitants of Montague*, 14 *Massa. Rep.* 282. *Okell vs. Smith*, 2 *Serg. and Low.* 316. *Lomi vs. Tucker*, 19 *Serg. and Low.* 255.

DORSEY, J., delivered the opinion of the court.

There is no pretence that the appellee was not a *bona fide* holder of the tobacco sold, without knowledge of its unsoundness, or that the kegs were not branded with the genuine mark of *Parkin's crooked brand*; but it is insisted that there was an implied warranty of quality, according to the principles settled by this court in *Osgood vs. Lewis*, 2 *Harr. and Gill*, 495. A fair exposition of the court's opinion in that case, will lead to no such inference. The general principle of the common law, is there more than once reiterated: "that in sales of personal property the seller is not answerable for any defects in the quality or condition of the article sold, without an express warranty or fraud." In enumerating some of the exceptions to this rule, it is stated, that if the buyer had no opportunity of ascertaining by inspection, the quality of the article, there is an implied warranty that it be saleable in the market, under the denomination by which it was sold." To sustain the appellant's position of implied warranty, no aid can be drawn from this exception. The purchase was of twenty-four kegs of tobacco, branded with *Parkin's crooked brand*," and by that denomination were they saleable in the market.

Of the quality of that tobacco nothing was stipulated. The terms on the part of the vendor were complied with, by the delivery of tobacco, thus characterized by the brand. By the brand it was saleable in the market, and that was the only assurance of quality, on which the vendee relied. Once admit the doctrine contended for by the appellant, and as to all commercial transactions, you, in effect, annihilate the distinction between warranty of title and warranty of quality. Every man who sells a barrel of flour, fish, pork, or any commodity subject to inspection, or which had acquired a reputation in the market, will be held impliedly, to warrant both title and quality. To such a length, this court feels itself wholly unauthorised to extend implied warranties. Nor could it do so, without explicitly overruling the case of *Johnson vs. Cope, and others*, 3 *Harr. and Johns*. 89, and unsettling the principles it has recognized in *Osgood and Lewis*.

Much stress has been laid on an isolated paragraph, extracted from *Osgood and Lewis*, in which this court have said, that "it is not sufficient that the article delivered, abstractedly bear the name of that contracted for; it must do more, there is an implied warranty that it be of that quality, which a commodity of that name must possess to be saleable in the market." But construe this sentence in conjunction with the remaining parts of the court's opinion, and the interpretations attempted to be affixed to it, cannot for a moment be sustained. The remark was predicated upon the case of *Bridge vs. Wain*, 1 *Stark*, 504, and immediately followed the reference made to it. In that case, *Wain* had sold to *Bridge* a quantity of "scarlet cuttings," an article in which the *English* dealt with the *Chinese* to a considerable extent. The proof was, that "scarlet cuttings" were understood in the market to mean cuttings of cloth only, without any admixture of serge or other materials; and that the article sold to the plaintiff did contain a quantity of serge, &c.

The position stated by this court, was designed to be nothing more than what was considered as there decided; that although the article delivered, abstractedly speaking, was scarlet cuttings, yet it was not scarlet cuttings of that quality, which were saleable in this market as such. So, in the present case, the delivery of any tobacco not branded as per the bill of parcels, no matter what its excellence might be, would be no compliance with the terms of sale: it would not be sufficient, because it did not possess that quality, attribute, characteristic mark, viz. *Parkin's crooked brand*, by which it was known, and rendered saleable in the market.

It was urged too, that from the nature of the article, and the manner in which purchases of it are made, the appellant had no opportunity of inspection, and that therefore the seller impliedly warranted its quality. But this exception to the general rule of *caveat emptor* does not apply to cases circumstanced like the present; but to those, where the examination at the time of sale, is, morally speaking, impracticable, as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience, or labour, is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.

It was likewise insisted, that the appellee, knowing the purpose for which the tobacco was purchased, impliedly warranted it to be suitable therefor; that the opinions of Chief Justice *Abbott*, and Lord *Ellenborough*, on which such a doctrine rests, were cited with approbation by this court in *Osgood & Lewis*. But this is not the fact. No sanction or approval was then, or is now designed to be given to those opinions. They were simply referred to, as showing how much further, some of the *English* judges appeared disposed to go, in engrafting exceptions upon the rule, *caveat emptor*, than this court had gone in the case of *Osgood & Lewis*.



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Steiger's Adm'r vs. Hillen.—1833.

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The County Court were right in instructing the jury, as in the first bill of exceptions, that there was no warranty of the quality of the tobacco sold. But they were clearly in error in the latter part of their instruction; that although the contract contained a warranty, and an offer to return the goods had been made by the vendee in due time; yet that it was no defence to the action unless the plaintiff knew of the unsoundness of the article. The *scienter* in such a case need not be alleged, and if charged, need not be proved.

This error of the court below, however, furnishes no ground for reversing their judgment. The appellant sustained no injury from it; as he had offered no proof either of a warranty, or a fraudulent *scienter*. And upon no event therefore, nor upon the assumption of both, or either of these grounds, was it competent for the jury to have given a verdict in his favor.

The same remarks are applicable to the opinion of the County Court, in the second bill of exceptions.

JUDGMENT AFFIRMED.

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STEIGER'S Adm'r vs. THOMAS HILLEN.—*June*, 1833.

A married man was seized of land in 1789, which during that year was sold at Sheriff's sale, to the ancestor of the defendant. The first tenant in fee died in 1802; his widow died in 1823. In 1827 the administrator of the widow filed a bill to recover a proportion of the rents and profits of the land, in lieu of dower. No demand or suit for the dower had been made or commenced by the widow in her life time; no reason was alleged for the omission. The purchaser and his descendants had been in possession from the time of sale. **HELD**, that the plaintiff could not recover.

Lapse of time may operate as a bar to a decree to account. In equity, laches and neglect are discountenanced; this tribunal only lends its power to reasonable diligence.

At law, a widow cannot recover damages against the alienee of her husband from his death, but only from the time of demand and refusal to pay her

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for, or assign her dower. The seoffee was not in default until that time. The same rule must prevail in equity under the same circumstances. Where she makes no demand before her death, her claim to rents and profits is gone.

**APPEAL** from the Court of Chancery.

The present bill was filed by the appellant, *Margaret Ann Steiger, Adm'r C. T. A. of Mary Steiger*, against the appellee, (*Thomas Hillen*,) on the 21st of September, 1827. It alleged that *Andrew Steiger*, the former husband of *Mary Steiger*, was in his life-time seized and possessed of certain parcels of land, now within the limits of the city of *Baltimore*. That being so seized, the said lands were by the then sheriff of *Baltimore* county, sometime in the year 1789, sold and conveyed to *Solomon Hillen*, (under whom the defendant claims,) who in virtue thereof, entered upon them; and that he, and the defendant, have ever since held and enjoyed the same, and received to their own use and benefit all the rents and profits thereof. That long prior to the aforesaid sale and conveyance by the sheriff to *Hillen*, the testatrix of the complainant, and *Steiger*, were lawfully married, and that they lived, and continued to be man and wife until his death, which occurred in 1802. That said *Mary* survived him, and departed this life in the year 1823, and that during the whole period from the death of her said husband, until her own death, the said *Hillen* refused to account to her, or to complainant, as her administratrix, for any portion of the rents and profits of said land, although the said *Mary* during her life-time, insisted to said *Hillen*, that she was entitled to dower therein, and claimed the same as her right. The bill then prays that defendant may be compelled to pay such portion of the rents and profits of said land, as the said *Mary* was entitled to, and for general relief.

The answer admits the seizin of *Steiger*, the husband, as charged in the bill; the sale by the sheriff to *Solomon Hillen* in 1789, and the possession of the said *Solomon*, and the defendant's possession after him, from that time to

the present. The death of *Steiger* the husband and wife, as alleged in the bill, are also admitted. The answer denies expressly, that *Mary Steiger*, or any other person for her, in her life-time, ever made any demand on the respondent for dower in said lands, of which his possession has been undisturbed since the death of *Solomon Hillen*, which happened in the year 1801. The respondent then alleges, that he has been advised, that complainant cannot maintain any claim against him for dower in said lands, or for the arrears thereof.

There was a general replication to the answer, and a commission to take testimony, but the proof returned under it, does not appear to vary the case, as made by the pleadings.

BLAND, Chancellor, (Sept. term, 1828.)

It appears that the late *Andrew Steiger*, more than fifty years ago, being then married to the late *Mary Steiger*, the testatrix of the plaintiff, was seized in fee simple of a certain parcel of land, which was afterwards included within the limits of the city of *Baltimore*, and of which the lots in question, are the same, or a part. That in the year 1789, these lots of land were taken under a *fieri facias*, issued on a judgment obtained against the late *Andrew Steiger*, and offered for sale, when *Solomon Hillen*, the father of the defendant, and under whom he claims, became the purchaser, and immediately obtained possession, which has continued in him, and those claiming under him, ever since without interruption. That the late *Andrew Steiger* died some time in year 1802, leaving his wife *Mary* then alive, who died in September, 1823; and that about four years afterwards, on the 21st of September, 1827, *Margaret Ann Steiger*, as the administratrix, with the will annexed of the late *Mary*, filed this bill; in which she avers, that her testatrix had been entitled to dower in these lots of land, and therefore claims of this defendant, *Thomas Hillen*, an account of the rents and profits of that dower estate, to which

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the late *Mary* has been entitled from the death of her husband, until the time of her own death. The defendant admits the truth of the facts which constitute this case so far; but he positively denies that the late *Mary*, at any time, ever made any demand of her dower of him, or of those under whom he claims; and says enough, as to the uninterrupted length of his possession, to entitle him to rely upon, and have all the benefit which can arise to him from the lapse of time. Proofs have been taken, but there is nothing in them which materially varies the case, as shown by the bill and answer. It does not appear, that the late *Mary* ever sued for, or made any demand of her dower, nor is the fact of her not having done so, or the great delay accounted for in any manner whatever.

This is a claim of the profits of an estate for life, in lands, made after it is fallen into the inheritance by the death of the person who was entitled to it, and its enjoyment. The principal has perished, but the incident benefits of that principal which had been received by the holder during its existence are now claimed. I have met with no instance of such a claim.

A widow brought a writ of dower, and obtained judgment; after which she took out a writ of enquiry of damages, but died before it was executed. Her administrator brought a *scire facias* upon the judgment, for the purpose of reviving it, and recovering the damages. But it was held that the tenant was a *deforcior*, guilty of a wrong which died with the person. *Salk.* 252, 3. *Mod.* 281. 1 *Show.* 97. *Carth.* 133.

From the manner in which this matter is said to have been decided, there is however some room to doubt, whether it must be considered as having been finally settled even at law. 2 *Brown*, C. C. 632. All private criminal injuries or wrongs, as well as public crimes, are buried with the offender. And in all cases of wrong, where the offender acquires no gain from the property of the injured party, there also the rule, *actio personalis moritur cum per-*



*sona* applies; and on the death of either party the right to reparation in damages for the wrong committed, is gone. But in a case where it cannot be denied, but that the holder of the estate has been enriched by property which did not belong to him, it would seem to be a strange misapplication of the rule to suffer it to effect a confirmation, by means of the accident of the death of the owner, of a right to a wrong-doer in property which he had unlawfully acquired. *Cowp.* 374.

But, however this may be at law, there is no doubt that in equity, the compensation given to a widow for the detention of her dower, is not considered as mere vindictive damages, the right to recover which, dies with the person.

The statute which gave her a compensation in damages in such case, meant it as an additional remedy; and that the mesne profits should afford her a subsistence from the time of the death of her husband; and therefore if she dies pending the suit, either before or after her right to dower has been established, the Court of Equity will go on to give to her representative, the amount of the mesne profits which had accrued, from the death of her husband up to the time of her own death. *2 Bro. C. C.* 620. *1 Fonb. Eq.* 159. It would seem to follow as a consequence of this determination, that damages for the detention of dower, do not arise from a wrong which dies with the person; that the amount of the mesne profits of the dower estate, to which the widow had become entitled, was a right to property vested in her, which would, in all cases, upon her death go to her legal representatives. But I do not find that the *English* authorities have recognized the principle entirely to this extent.

It is laid down by the most profound and accurate of the *English* lawyers, that if the heir, or his feoffee assign dower, and the wife accepteth it, she loseth her damages. *Co. Litt.* 33. The reason of which, as given by a respectable compiler, is, because having the dower which is the principal, she cannot sue for damages, which are but *conse-*

*quential, or accessory*, 2 *Bac. Abr.* 392. If on the acceptance of dower, the claim to damages for its detention cannot be sustained, because it is an accessory which cannot be separately demanded; then it would seem that any other circumstance, such as the death of the widow, which puts an end to the title to dower, would in like manner extinguish the right to recover damages for its detention.

But this position, that the acceptance of dower amounts to a relinquishment of the right to the damages, is in truth, founded on the accord and acceptance of satisfaction of the party; and not on the notion that damages are but *consequential or accessory*, and as such cannot be recovered after the principal has been yielded up, or has ceased to exist. For if such was the rule, then it should apply to all analogous cases; and wherever the principal had in any manner ceased to exist, all accessories of every description would perish with it. It is true, that in many respects a due regard is paid to the property, out of which the demanded rents and profits were derived; since it has been held in several cases, that the court cannot decree an account for rents and profits, without having any regard to the recovery of the possession, or give mesne profits but as incident to a claim of possession, which is either admitted or adjudged to be well founded; for if a party neglects his right to a real estate, until it is barred or extinguished, he shall not be allowed to come into a Court of Equity to recover the rents and profits of it. 1 *Atk.* 523. *Pre. Chan.* 252, 516.

In real actions no damages were recoverable by the common law, because the question of title was first to be decided, and until that was determined, no question as to rents and profits could arise. This disposition to keep the two enquiries separate, has in fact divested the action of ejectment of its mixed character, and reduced it to a mere suit for the trial of the possessory title to real estate, and nothing more. But after the lessor of the plaintiff has, by that suit, established his title, and obtained possession, he may then bring a new and separate action for the mesne profits, or

that which is, in truth, but consequential or accessory to that he had previously obtained. Every demand of rents and profits by a suit of any kind, necessarily involves a question as to the legal title to the estate, the rents and profits of which are demanded. But in *England*, a Court of Equity never in any case undertakes to determine a mere legal title; and therefore if the legal title to dower is denied, the case must be referred to a court of common law, to be tried and determined before the Court of Chancery will proceed. Upon these grounds a denial of the widow's legal right to dower, might after her death present an obstacle in the way of the demand of rents and profits, made by her *personal* representative, which a Court of Equity would not be able to remove; because a court of common law could not try the validity of a legal title, which had become extinct; and where also, according to its own principles, there could be no object in ascertaining whether or not it had ever previously existed, since the damages which the deceased owner might have recovered, had she lived to establish her right, were founded on a wrong which died with the person.

But whatever difficulties may exist in relation to this subject in *England*, I conceive, they have been altogether removed by the principles that have been established in *Maryland*.

I have considered it as well settled, that this court has an absolute, and entirely concurrent jurisdiction in all cases of dower with the courts of common law; and consequently, that a widow comes into this court unembarrassed by any question that may arise, from the denial of the legality of her title. For this court having obtained jurisdiction of of the case, will extend its power to every branch, and bearing of the subject; and in order to put an end to the controversy, will determine every question, whether as to legal title, or mesne profits, that may or can arise. And acting with such unlimited power, and upon the principle that the compensation given to the widow, for the detention

of her dower, is not to be considered as vindictive damages, the right to recover which, dies with the person ; but as a portion of the property, the right to which had vested in her, it will not hesitate to enquire, and decide after her death, whether she had been vested with such a legal title to dower, as would have entitled her to those rents and profits of it, which, after her death, should be awarded to her personal representative, who comes into court to demand them.

Rents and profits of real estate are in many respects analogous to interest or money. It is a general rule, that where a purchaser has obtained the possession of real estate he had purchased, and receives the rents and profits of it, he shall pay interest on the purchase money. The receipt of the one, involving a duty to pay the other ; each being considered as the product of the respective values that had been exchanged. 3 *Atk.* 637. 12 *Ves.* 27. 1 *V. and B.* 501. So on the other hand, war, any public calamity, or the act of God, may be such as to discharge the holder of the land from his accountability for its rent and profits. *Co. Lit.* 249. 4 *Co.* 82. And also, such as to stop the accumulation of interest, 3 *Call.* 22. 2 *Dall.* 102, 133. They are both accretions and additions to the principal subject, the right to which, as property, vests in the owner of the principal as they arise.

If a debtor pays the whole amount of the capital, leaving the interest only due, the creditor may nevertheless, sue for, and recover the interest alone, in an action brought only for that purpose. 2 *Ves. Jr.* 162. 4 *Harr. and Johns.* 337. But if the creditor comes to a settlement of accounts with his debtor, and accepts the principal, leaving the whole, or a part of the interest unpaid, he cannot recover it ; because by his own accord, and accepted satisfaction, it has been relinquished. 3 *Johns.* 229. 5 *Johns.* 268. The position is, therefore correct, that if the widow accepts an assignment of her dower from the heir, she thereby loses damages ; and that on the ground of her own accord, and



accepted satisfaction, and not merely because they are consequential or accessory ; and hence, if the widow does no act which can be construed into a relinquishment of the rents and profits of her dower, I cannot conceive why her *personal representative* should not be allowed to recover them, after the dower estate had by her death fallen into the inheritance.

If this claim was fresh, and strong on the ground of its having grown into existence during a short continuance of a recently fallen dower estate ; or if the delay had been sufficiently accounted for, I should not have had much hesitation in pronouncing a judgment in favor of the plaintiff, upon the principles I have explained, notwithstanding the novelty of its character, and the fact of there being no instance to be found in the *English* books, of such a claim ever having been made. But this is in all respects, a very old, and a very stale claim. It would seem, that although dower may be barred by a fine, and non-claim, within five years after the right had accrued, 2 *Bac. Abr.* 381 ; yet the statute of limitations does not in any way apply to an action of dower at law ; 6 *Johns.* 290. And it is also said that it affords no bar in equity, to a claim for the *arrears* of dower, without special ground. 9 *Ves.* 222. But the very great length of time during which this claim has been suffered to slumber, cannot, nor ought not to be overlooked.

The defendant, and those under whom he claims, have been nearly forty years in the undisturbed possession of this real estate. The late *Mary's* right to dower in it, if she ever had any, accrued by the death of her husband more than twenty years before her death ; and it was not until four years after her death, that this suit was instituted for the rents and profits, to which it is alleged she had become entitled during her widowhood ; but of which, or of her dower, it does not appear, that she ever made any demand ; nor is this great delay accounted for in any manner whatever. Therefore, upon this ground alone, of the very great lapse of time, I feel myself bound to reject this claim.

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2 *Vern.* 276. *Pre. Cha.* 518. 1 *Atk.* 494. 2 *Atk.* 610.  
 3 *Bro. C. C.* 645. 4 *Bro. C. C.* 268. 2 *Ves. Jr.* 583. 4  
*Rand.* 454. 6 *Wheat.* 498.

*Decree*, that the bill be dismissed with costs.

From this decree, the complainants appealed to the Court of Appeals.

The cause was argued before EARLE, and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Mayer*, for the appellant, contended,

1. That the rents and profits of *Mary Steiger's* dower portion of the land, are recoverable, although not demanded in her life-time, and although her dower was not assigned to her. *Wells et ux. vs. OBeal*, 2 *Gill and Johns.* 468. *Mundy vs. Mundy*, 2 *Ves. Jr.* 122. *Mundy vs. Mundy*, 4 *Bro. C. C.* 294. The recovery of rents and profits in equity, is not merely incidental to the recovery of dower at law; they are decreed upon the ground, that the tenant in possession is a trustee for the widow. If in cases of this sort, there has been an unreasonable delay, a court of equity will refuse interest, and sometimes costs; but if the defendant does not allege payment, and the loss from lapse of time of the evidence of the payment, the principal will be decreed, and this without a previous demand of dower on the part of the widow. *Geast vs. Barber*, 2 *Bro. C. C.* 61. *Duke of Leeds vs. Corporation of New Randor*, *Ib.* 519. *Curtis vs. Curtis*, *Ib.* 620. *Ib.* 631. *Burridge vs. Bradyl*, 1 *P. Wms.* 127. 1 *Roper's Husband and Wife*, 447, 8, 9. 1 *Fonb. Eq.* 22, 39. *Mundy vs. Mundy*, 2 *Ves. Jr.* 122. *Coop. Pl.* 136. 3 *Atk.* 24. *Ib.* 130. *Hayer vs. Thurber et al.* 4 *Johns. Ch. Rep.* 604. *Swaine vs. Perine*, 5 *Ib.* 482.

2. The objection of length of time, to raise a presumption of payment, is not taken in the answer; but if taken, it is rendered nugatory, by the residue of the answer, which admits, among other things, that no payment has ever been

made; and finally, that no one having been liable for these rents and profits, except the defendant, and he suggesting no difficulties in the way of accounting, occasioned by the lapse of time, the objection is not in this case open to him. *Edsell vs. Buchanan*, 2 Ves. Jr. 83. *Stackhouse vs. Barnston*, 10 Ves. Jr. 465.

3. Limitations do not run against a claim for dower. *Ainslie vs. Medlycott*, 9 Ves. 22. *Foster vs. Wood*, 6 Johns. C. Rep. 290. 3 Harr. and McHen. 38.

4. The rents and profits are to be accounted for, from the death of the husband.

*T. P. Scott*, for the appellee.

The cases cited on the other side, were cases in which the husband *died seized* of the property, which circumstance does not exist here. But if it were so, still, as no claim for dower was made by the widow in her life-time, her personal representative is not entitled to the rents and profits. The object of the law, in allowing dower to the widow, was that she should have a support during her life-time. 1 *Thos. Co. Lit.* 527, 569. 4 *Kent. Com.* 35. And consequently, a claim on her part, during her life is necessary. *Norton vs. Frecker*, 1 *Atk.* 525.

Prior to the statute of *Morton*, neither damages could be recovered at law, nor rents and profits in equity on account of dower. 1 *Coke Lit.* 585. And as by that statute, damages at law could only be recovered where the husband died seized, so the corresponding remedy in Chancery, for the rents and profits is gone, if the same circumstance does not exist. *Mundy vs. Mundy*, 4 Bro. Ch. C. 295. 4 *Kent's Com.* 63, 64. *Swaine vs. Perine*, 5 Johns. Ch. Rep. 482.

2. If however, the present bill had been filed by the widow herself, still, in consequence of the great lapse of time, the court would dismiss it. *Deloraine vs. Browne*, 3 Bro. Ch. R. 645. *Hircey vs. Dinwoody*, 4 *Ib.* 268. *Pickering vs. Lord Stamford*, 2 Ves. Jr. 583. *Underwood vs. Lord Courtown*, 2 Sch. and Lef. 71.

It is said, the answer does not properly take the defence of lapse of time. It does do so, at least in substance, and as the plaintiff has not demurred, he cannot avail himself of any mere formal objection.

ARCHER, J., delivered the opinion of the court.

This is a bill filed by the administrator of *Ann Steiger*, to recover the rents and profits of land, in which, in her life-time, she had a claim of dower.

The husband during the marriage anterior to the year 1789, was seized of the lands, out of which the rents and profits are claimed, and the same in that year were sold at sheriff's sale to the ancestor of the respondent, who, together with the respondent, have been ever since in possession of the lands. The husband of the complainant's intestate died in 1802, and she herself died in 1823, without ever having demanded, claimed, or sued for her dower. The present claim was presented in chancery by the administrator on the 21st of September, 1827.

Thus it appears that the respondent has been in possession, undisturbed by any claim of dower, for a period of twenty-one years, and that the bill was filed by the administrator, after the lapse of four years, from the death of the widow, and that no claim for rents and profits has been made during a period of twenty-five years.

Lapse of time may operate as a bar, to a decree to account. In equity, *laches* and neglect are discountenanced. Stale demands, without any effort to enforce them, and after a long acquiescence, cannot meet the aid of a tribunal which only lends its power to reasonable diligence. After the lapse of twenty-five years from the inception of title, a delay, entirely unexplained, and without any claim whatever, in the intermediate time being made, it would seem to be against public policy and convenience to allow the commencement of a controversy for rents and profits.

Be this however as it may, there exist other grounds



which in our judgment, are entirely decisive of this controversy.

Here the lands have been aliened in the husband's life-time, and here is the occurrence of the widow's death, without any recovery or suit, demand or claim therefor in her life-time, and without the averment or proof of the existence of any circumstance calculated to prevent the one or the other.

The authorities have been carefully examined, to ascertain whether such a case had before occurred for adjudication. But the most diligent search has not enabled either the court or the counsel to ascertain any claim of a similar character.

At law, the widow could not recover damages against the alienee of the husband from his death, but only from the demand and refusal. The feoffee was not considered in default until on application he refused and neglected to assign to the widow her rights, and it was supposed that being in possession, he had good authority as against her, to take the profits, until he required her dower.

The same rule must prevail in equity under the same circumstances. The widow who is in pursuit of a legal claim, and is desirous of claiming from the alienee rents and profits anterior to the demand, should show to the court some equitable circumstances. No misrepresentation, fraud, or concealment, whereby she was prevented from preferring her claim, has been pretended to exist; nor is it intimated that there existed any legal impediments in her way, so that a demand on her part might have been rendered fruitless.

And to show a total absence of all ground for enabling a Court of Equity to look upon the alienee in the light of a trustee, and in that capacity accountable for the rents and profits, we have no evidence that the respondent ever knew, that any incumbrance of dower hung over the estate. For any thing which appears to us, even the exis-

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tence of the widow, or of any rights she ever had, were unknown. Were she then living, and claiming dower and rents and profits, under such circumstances these could not be claimed anterior to the filing of the bill.

In this case, however, during her life-time, no claim to dower is set up in any manner. And the bill is filed against the respondent by her administrator. Her claim to the rents and profits bearing date only from the demand under the circumstances of this case, and there having been no demand, it follows that her claim to rents and profits is gone. We are not aware of any case, which has gone further than to entertain a bill for rents and profits, where the widow dies pending her bill for dower. In such case, they have been allowed her representative in equity, with this exception, where the legal estate out of which the profits are to spring is gone, the claim to such profits falls with it, unless they should probably be maintained by showing the existence of some of the circumstances above adverted to, none of which we have seen exist here.

DECREE AFFIRMED WITH COSTS.

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OWINGS & PIET, use of OWINGS, vs. HENDERSON P. LOW.  
*June, 1833.*

In an action for goods sold and delivered, a clerk of the plaintiff may give evidence of the delivery of goods, by referring to entries in the plaintiff's books made by such clerk, testifying to his belief of their truth at the time of making them, and proving generally the dealings of the defendant with the plaintiff for such articles as those charged by the clerk; but he cannot establish such a delivery, by reference to entries made by the plaintiff or other clerks, of which he has no knowledge other than that arising from the course of business of the plaintiff's store.

There is no usage in this State which makes the books of accounts of a storekeeper, evidence *per se*, upon proof that he is a man of integrity.

Pending an action brought by O and P, as partners, for certain hardware sold and delivered, the partnership was dissolved, and the interest of P in the effects of the firm assigned to O for value. The suit was then enter-

ed for his use. At the trial the defendant proved that during the partnership one of the plaintiff's informed the witness, that they had an interest of three-fourths in certain houses building on F street by the defendant, and that the defendant was to take hardware for that interest. The defendant then proposed to prove, that in a conversation *after the dissolution*, P informed the witness, that the plaintiffs had taken an interest of *three-fourths of a house* in the houses aforesaid, and the plaintiffs were to give defendant the hardware for which this suit was brought, for such interest. The County Court admitted the evidence, but this court upon appeal, decided it to be incompetent.

Declarations of a partner, made after dissolution, cannot *per se*, establish a contract against his co-partner.

The declarations of an agent, in relation to his agency, made subsequent to its execution, when his authority was *functus officio*, are not evidence against his principal.

Courts of common law have, to a limited extent, for the purposes of justice, recognized the interests of the assignees of legal *choses in action*; and by a summary equitable jurisdiction, exerted on motion, they will protect those assignees against such acts or admissions of their assignors, as would operate in fraud of their rights. This protection is afforded, whether the defence arises upon plea, or appears upon evidence under the general issue.

Where O and P were partners in trade, and upon the dissolution, P assigned for value, all his interest in the partnership effects to O, a court of law will not permit P by his mere declaration made after such assignment to defeat an action brought in their joint names.

The plaintiff upon the record at common law, cannot, unless he voluntarily waive his privilege, be compelled to give testimony for the defendant.

The case of *Wood, et al*, assignees of *Hussey, et al*, vs. *Braddock*, 1 Taunt. 104, overruled.

### APPEAL from Baltimore County Court.

Action of *Assumpsit* for goods sold and delivered brought by *Owings & Piet vs. Low*.

This case was decided by the Court of Appeals at June term, 1826, 7 *Harr. and Johns*. 124, reversing the judgment of the County Court in favor of the defendant, upon the appeal of the plaintiffs, the present appellants, and sending the case back with a *procedendo*.

1. Upon the second trial the plaintiffs offered to give in evidence by one *Alexander Manro*, a competent witness, that during the years 1818, and a part of 1819, he and one

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*John Dukehart, Jr.*, were clerks in the employ of the plaintiffs, who carried on the hardware business in the city of *Baltimore*. That during that time various articles of hardware were sold and delivered to defendant. That sometimes the things were delivered by witness to defendant, or his order; sometimes by plaintiffs, or one of them; and sometimes by said *Dukehart*. That the charges for the same on the day book of plaintiffs, now produced, were at times made by witness, or by one or the other of said persons. That all the things charged by himself he knows were delivered as charged, because he never made such charges without delivery. And that it was the constant usage of the said plaintiffs, and *Dukehart*, never to make entries in the book without a like delivery. That witness, during the whole of the period of the said charges, was constantly in said store of plaintiffs, except when he was at his meals, and at night, after the hours of business; and occasionally out of the store upon other business, which was but seldom. That he knows that in some cases some of said charges were made by one of the plaintiffs, when he, witness, was attending to the delivery of the articles. That when this was the case, the witness called to the said plaintiff, a list of the items delivered, when he, plaintiff, was at the desk, and with the said book before him; but he is not able to particularize the said charges, nor does he know that in such instances he examined, after said charges were made, to see if they were correct, nor can he now tell whether they are correct. In some cases, however, of that sort, there are charges in witness's hand writing on the same day, and immediately preceeding or following said charges by plaintiffs, or *Dukehart*, and he thinks it is probable he may have seen said charges. He is sure he never did see any instance of any such charges being made when the goods were not delivered, nor does he know whether or not such charges, or any charges except those in his hand writing, were correctly or incorrectly made; nor has he any recollection of the delivery of any particular article so



charged, except his belief arising from the facts before stated, and because he knows the said plaintiffs to have been correct and honest men, who would not make false charges in their books. Whereupon the plaintiffs by their counsel offered to give said evidence of said witness, and all of said charges against defendant, from said day book, as well those in the hand writing of witness, as those in the hand writing of plaintiff, or *Dukehart*, for the purpose of charging the defendant in this action, with the value of all the said articles charged in said book, during said period to the defendant. To the admissibility of which evidence, (except the evidence of the entries actually made by the witnesses, and as to the goods and amounts, and particulars comprised in such entries,) the defendant objected; which objection the court, (ARCHER, Ch. J.,) sustained. The plaintiffs excepted.

The plaintiffs then gave in evidence by the said *John Dukehart, Junior*, in the plaintiffs' first exception mentioned, that he was a clerk in the employ of the plaintiffs, from October, 1818, to the termination of the partnership of the said plaintiffs, as hereinafter given in evidence by them. That during that time, he knows that at various periods, sundry articles of hardware of the said plaintiffs were delivered either to defendant, or to his order, and charged to defendant's account by his defendant's direction. That sometime in the month of April, in the year 1819, the plaintiffs stopped delivering any more hardware to defendant, when defendant called upon plaintiffs to know the cause, when he was told by them, that they could not deliver any more to him, unless he would pay or settle for the amount then delivered, and he then told plaintiffs, (and offered to do so,) that he would give his note for \$1000, endorsed by one *John Walsh*, and *Walsh's* note for \$1000, endorsed by defendant; the amount delivered of said hardware up to this time, being estimated or supposed to be \$2000. That plaintiffs agreed to this, and the notes were then drawn, and for a few days, some other small amount of hardware was

delivered to defendant, or his order, when defendant informed plaintiffs, that he could not comply with his agreement to give said notes, because said *Walsh* refused to execute them. The plaintiffs then stopped delivering any more hardware to defendant. The plaintiffs further gave in evidence the following paper, for the purpose of proving a dissolution of said partnership of plaintiffs, and the assignment of all *Piet's* interest in the property of, and debts due said firm, to *James Owings*, one of the plaintiffs, and which said paper is admitted to be in the hand writing of *John Piet* the other plaintiff.

“*Baltimore*, June 8th, 1820. Received of *James Owings*, nine hundred and twenty-two dollars and fifty-five cents, in full payment of all my part of the goods, notes and accounts of the firm of *Owings* and *Piet*, which I had on concern, which was this day dissolved by mutual consent. *John Piet*. Witness, *John Dukehart, Jr.*”

And the defendant thereupon offered in evidence, by *Ignatius Boarman*, that in the latter part of the year 1818, the witness went with a certain *John Walsh*, to the store of the plaintiffs, in order to obtain hardware for certain houses in *Franklin* street, in the city of *Baltimore*. That *Walsh* told the plaintiffs to furnish the said hardware on account of said houses. That *Piet*, one of the plaintiffs, proceeded to charge the said hardware to the witness, against which the witness objected, and that said *Piet* then told the witness, that the plaintiffs, in the first instance, charged the hardware got for said houses, against the persons who got the same, and meant when all the houses were finished, to turn it over against the houses, on account of their interest in the said houses. That witness was told by the plaintiffs in conversation, during the copartnership, that they had an interest of three-fourths in the said houses in *Franklin* street, building by *Low*, and that *Low* was to take hardware for that interest. That witness was asked by the plaintiff *Owings*, what witness thought of his bargain, to take the said interest for hardware, when witness

told him he thought it was worth nothing. The defendant further then offered to prove by said *Boarman*, that after the dissolution of the partnership of said plaintiffs, that plaintiff, *Piet*, again informed witness, that the plaintiffs had taken an interest of three-fourths of a house, in the houses aforesaid, in *Franklin* street, and that the plaintiffs were to give said *Low* hardware, for which this suit was brought for the said interest. The plaintiffs gave in evidence, that before said witness was called, the suit had been entered for said *Owings*' use, but that it was entered on the day when he was called, and that such use was so entered by the order of plaintiff's counsel; to the admissibility of which said latter declaration, as made by said *Piet*, after said dissolution and assignment of said partnership of plaintiffs, as said dissolution and assignment are proved by the plaintiffs, they objected; but the court (*ARCHER*, Ch. J.) overruled the objection, and permitted the same to be given in evidence to the Jury.

The plaintiffs excepted, and the verdict and judgment being against them, they prosecuted the present appeal.

The cause was argued before *BUCHANAN*, Ch. J., and *EARLE*, *MARTIN*, *STEPHEN*, and *DORSEY*, J.

*Gill*, for the appellants contended, upon the first exception, that the evidence of *Manroe*, proposed to be given, and rejected, was admissible under the circumstances, as part of the *res gestæ*. That the book mentioned in said proposed evidence, was admissible upon the same principle; that the entries therein, being made in the ordinary course of business, were admissible as confirmatory evidence, and necessary for that purpose. *Case vs. Potter*, 8 *Johns. Rep.* 211. *Vosburgh vs. Thayer*, 12 *Ib.* 461.

2. That after the dissolution of the partnership, and the assignment by *Piet* of his interest therein to *Owings*, and after the bringing of the suit, *Piet* could do no act to discharge such suit, and therefore his declarations made sub-



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sequently were not evidence. *Frear vs. Evertson*, 20 Johns. Rep. 142. *Baker vs. Stackpole*, 9 Cowen, 433.

3. That as *Piet* had no interest in the suit, being only a nominal party, he was a competent witness for the defendant, and his declarations consequently could not be given in evidence. *Thomas vs. Denning*, 3 Harr. & Johns. 242.

*Moale* and *Mayer* for the appellee.

1. The *usage* which prevails in *New York*, in regard to the admissibility of entries made by the parties themselves in their books, does not obtain in this *State*, and consequently the cases referred to on the other side, can have no bearing upon the judgment of this court.

The acts of 1729, *ch.* 20, and 1795, *ch.* 46, are conclusive to show the absence of any such usage. Nor can the plaintiffs avail themselves of the doctrine of *res gestæ*, that being only applicable, when the *thing* in relation to which it is asserted, is proved to be done. But here, the very question is, were the articles charged, sold, and delivered, and until that is proved, no foundation is laid for the application of the *res gestæ*. Upon this exception they cited, *Digby vs. Stedman, et al.* 1 Esp. Cases, 328. *Price vs. Earl of Torrington*, 1 Salk, 285. *Pitman vs. Maddox*, 2 Ib. 690. 1 Phillips' Ev. 195, note (a). *Calvert vs. Archbishop of Canterbury*, 2 Esp. Rep. 646. 1 Stark. Ev. 72. *Pritt, et al. vs. Fairclough, et al.* 3 Camp. Reps. 305. *Harrison vs. Blades, et al.* Ib. 457.

2. The declarations of *Piet* were evidence against the plaintiffs. Every thing which occurs during the partnership, in relation to the business of the concern, is evidence against the partners; and the admissions of either of them, though made after the dissolution, are admissible in behalf of third persons, to defeat a partnership demand. *Wood vs. Braddick*, 1 Taunt. 104. 1 Saund. P. and Ev. 62. *Lucas et al. vs. De La Cour*, 1 Maule & Selw. 254. *Van Reimsdyk vs. Kane, et al.* 1 Gallison Rep. 631.



The object of the proof was not to charge the partners, but to show the nature of a contract made during its continuance. *Ward vs. Howell*, 5 *Harr. and Johns*. 60.

It was not competent to the defendant, to examine *Piet* as a witness; at least he could not do so, without releasing him from his responsibility for costs, which he was under no obligation to do.

The declarations of the plaintiffs on the record, are always admissible to defeat the action, though he is a mere trustee. *Lovelace vs. Curry*, 7 *Term. Rep.* 633. *Lucas et al. vs. De La Cour*, 1 *Maul. and Selw.* 249.

But at all events the declarations of *Piet*, are evidence against himself; and the action being a *joint* one, for the recovery of a *joint* debt, the plaintiffs must fail, if the evidence shows that one of them has no claim. The plaintiffs declare for a joint claim, and cannot be permitted to recover for a separate one.

It does not appear that the defendant had notice of the assignment to *Owings*, until the paper was produced at the trial, which distinguished it from the case in *New York*.

The consent of *Piet alone* would not have made him a witness. *Owings's* consent must also have been obtained. *Frear vs. Evertson*, 20 *Johns.* 142. But if his *single* consent would have been sufficient, still, as he could not be *forced* to testify, his declarations could be proved. *The City Bank, Baltimore, vs. Bateman*, 7 *Harr. and Johns.* 108. *Wood vs. Braddick*, 1 *Taunt.* 104.

*Johnson* in reply.

1. The opinion of the court, in the first exception precluded the plaintiffs from recovering the price of any of the articles, except those, which were delivered and charged by the witness himself; though some of those which were charged by the plaintiff, were delivered by the same witness. In relation to these, at least the evidence was suffi-

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cient to go to the jury, as tending to prove the sale and delivery.

2. In regard to the admissibility of the declarations of parties, the rule is the same with respect to plaintiffs and defendants, and in reference to the latter, it is well settled that the admissions of a partner, after dissolution, are not evidence to charge his former partner. 5 *Harr. and Johns*. 60.

The ground upon which such evidence is excluded, is, that after the dissolution of the partnership, the parties have ceased to be the agents of each other. And it is not material whether the agreement proposed to be proved by *Piet*, was made before or after the dissolution. If before, still *subsequent* declarations by *Piet*, in relation to it are not evidence against *Owings*, because then he had no authority to speak for him.

DORSEY J., delivered the opinion of the court.

From the opinion of the County Court in the first bill of exceptions, we do not feel ourselves at liberty to dissent. The testimony given by the witness, except as it relates to his own entries in the day book, was of a character so vague and indefinite, that upon no sound principles of reasoning or inference, could the jury have made it the basis of a verdict for the plaintiffs. The court therefore were right in instructing them, of its legal insufficiency for the purpose for which it was offered. To establish the entries made by *Dukehart*, it has not, even in the argument been pretended, that it was available. To sustain those made by the plaintiff, it was so destitute of every thing like precision or certainty to any intent, that the court acted wisely in withdrawing it from the consideration of the jury.

The cases referred to from *New York*, in which, by a local usage, the books of accounts kept by creditors themselves, who are proved to have been of fair character, and correct in their dealings, are sufficient evidence before a jury to establish such accounts, it cannot be necessary to re-

mark are of no authority in this State, where such an usage not only never existed, but is at war with all the acts of our legislature, in relation to proving accounts, and the uniform decisions of our courts of justice upon the subject.

In permitting the testimony objected to, in the second bill of exceptions, to go to the jury, we think the County Court erred. The declarations of *Piet* were made after the dissolution of the partnership; and consequently after all power had been withdrawn from him, either by word or deed, to create any new contract obligatory upon *Owings*, his former partner. The incompetency of partners to bind each other after dissolution, applies as well to cases in which they sue in the character of plaintiffs, as to those in which they stand in the attitude of defendants. Did the declarations of *Piet* assert the evidence of a partnership contract, of which, no other evidence had been previously offered, presents itself to our inquiry? Of this there can be no doubt. The only proof before produced to defeat the plaintiffs claim was, that the hardware charged in their account was not to be paid for by *Low*, but furnished by the plaintiff's under a special contract, which secured to them, as its equivalent, an interest of three-fourths in the houses to be built upon *Franklin* street. Instead of relying on this agreement, the defendant offers the declarations of *Piet* made after the dissolution of the partnership, to prove a new and entirely different contract, by which the plaintiffs are said to have "taken an interest of three-fourths of a house in the houses aforesaid on *Franklin* street, and that the plaintiffs were to give said *Low* hardware, for which this suit was brought for the said interest." To support the opinion of the County Court, the case of *Wood and others*, assignees of *Hussey and others vs. Braddick*, 1 *Taunt.* 104, has been referred to, and that case, it must be admitted, does go the whole length of the decision made by the County Court.

But to the principle there established, we never can assent. The question was, whether certain merchandize had

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been consigned to *Cox and Braddick*, or to *Cox* alone, and without any other proof than a letter from *Cox* written four years after the dissolution of the partnership; it was held, that the consignment was made to the firm, and not to *Cox*. With as much propriety might it be insisted, that the declarations of an agent in relation to his agency, made long subsequent to the execution thereof, when his authority was *functus officio*, were evidence against his principal. If the letter of *Cox* had been the statement of some fact, in relation to a contract, into which it had been proved by other testimony, that he and his partner had entered; as for example, that a certain balance was still due, or that the contract on their part had not been complied with, the admissibility of the evidence might have been insisted on, with some plausibility; and it would not have been without analogies in the law to sustain it. As where two persons give a joint and several note; the admissions of one of them that the note was unpaid, or the like, would be evidence against both. But to permit one partner, after the dissolution of the partnership, by his simple declarations, to impose upon his former co-partner any contract which he in said declarations may see fit to state, as having originated anterior to the dissolution, appears to us a solecism in the law, and productive of consequences so ruinous and unjust, that if sanctioned, no prudent man would ever form a co-partnership. That such a principle does not prevail in *Maryland*, is settled by the decision of this court, in *Ward vs. Howell and others*, 5 *Harr. and Johns*. 60.

In *New York*, the doctrine, that the admissions of a partner after dissolution, as to transactions during the partnership, are not evidence to bind the other partners, is put to rest by numerous decisions; and they draw no distinction between such admissions, when made of a contract of which they are the only evidence, and where made in relation to a contract substantiated by other testimony. *Baker vs. Stackpole*, 9 *Cowen* 433, and the cases there referred to.



It is said however, that no matter whether the admissions of *Piet* bind *Owings* or not, they are admissible against him who made them, and are sufficient to bar his recovery; and it being a joint action at law, there cannot be a separate judgment in favor of one of the plaintiffs.

In refusing to permit the defendant to set up such a defence, we think the County Court, under the circumstances of this case, were clearly right. Long before the declarations offered in evidence were made, *Piet* had for a valuable consideration, assigned all his interest in the cause of action to his co-partner. To permit him afterwards, by his simple declarations or admissions to defeat such claim would be a fraud upon *Owings*, which nothing but an imperious obligation to submit to some inflexible principle of law, would induce us to tolerate. None such exists in this case. Courts of common law have long since recognized to a limited extent, for the purposes of justice, the interests of the assignees of legal *choses in action*; and by a summary equitable jurisdiction exerted on motion, they will protect those assignees, against such acts or admissions of their assignors, as would operate in fraud of their rights. This protection is afforded by refusing to permit the defendant to avail himself of the defence thus furnished him, whether attempted to be asserted in the form of a plea, or by way of evidence under the general issue. As authorities for such a practice, see *Frear vs. Evertson*, 20 Johns. 142. *Jones vs. Witter*, 13 Massa. 304. *Jenkins vs. Brewster*, 14 Massa 291. *Legh vs. Legh*, 1 Boss. & Pul. 447. *Jones and Matthews vs. Herbert*, 7 Taunt. 421. *Hickey vs. Burt*, 7 Taunt. 48. *Skaife and Caris vs. Jackson*, 3 B. and C. 421.

It has been contended, that the case of *Thomas' Exec'r vs. Denning* use of *Page*, 3 Harr. and Johns. 242, was a conclusive authority, that no such practice existed in this State. But such an inference is not warranted by that case, whatever may have been the opinion of the reporters on that subject. The judgment no doubt rested on the

fact, that the nominal was the real plaintiff, there being no evidence that the *chose in action* had ever been assigned.

To evade the force of this necessary and wholesome exercise of equitable jurisdiction by courts of common law, it has been insisted, that the essential ingredient to warrant its exertion is wanting, to wit, a previous notice of the assignment to the defendant. But such notice under the circumstances of this case, is wholly immaterial. The want of it has subjected him to neither detriment nor inconvenience; he has done nothing in ignorance, which he would not have done with full knowledge of the assignment.

The inadmissibility of the evidence was pressed upon another ground; that *Piet* having no beneficial interest in the controversy, he could have been called as a witness, and therefore his declarations were inadmissible, not being the best evidence of which the nature of the case would admit. But from this position we must dissent. The plaintiff upon the record at common law, cannot, unless he voluntarily waive his privilege, be compelled to give testimony for the defendant. Such a voluntary waiver, he, the defendant, was neither bound to have anticipated nor accepted. Indeed, if the decision before cited from 20 *Johns.* is to be respected, *Piet* could not have been received as a witness, but by the assent of *Owings*, the *cestui que use*. The competency of the testimony offered, stands unaffected by this objection.

We concur with the County Court, in their opinion, in the first bill of exceptions, but dissenting from that, in the second, we reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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McCreary vs. McCreary.—1833.

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**JAMES McCREARY vs. BENJ. McCREARY.—June, 1833.**

In an action of debt to recover the amount of a single bill, due in 1824, the defendant pleaded by way of set-off, a claim for various articles sold and delivered; and upon the trial, proved a lease of land by him to the plaintiff, dated in 1830; in which the plaintiff covenanted to pay the defendant a certain annual sum for life, &c. and to pay all claims and demands existing against the defendant at the date of the lease. The defendant also proved an appraisement made at the request of the parties, of various articles of personal property, (which the appraisers certified the plaintiff was to take as his property at the valuation;) that such articles were delivered to the plaintiff at the valuation; and that the lease, appraisement and delivery were made at the same time. The plaintiff then proposed to prove a verbal agreement between him and defendant, that the value of this property should be applied by the plaintiff to the payment of the outstanding debts of the defendant. The County Court rejected the evidence, but this court reversed that decision, and **HELD** that as the appraiser's certificate did not show in what manner the property valued was to be paid for, parol evidence was admissible to ascertain that fact.

Parol evidence is admissible in cases of written contracts, to prove any collateral, independent fact, about which the written agreement is silent; such proof is perfectly consistent with, and does not in the least tend to contradict, vary or explain the written instrument.

In an action of debt upon a single bill, where the issue was joined upon the defendant's plea in bar of a sale to, and a claim for the hire and use of various articles of personal property against the plaintiff, evidence which shows a delivery of such personal property by the defendant to the plaintiff, in consideration of the plaintiff's agreeing to pay all the defendant's debts is not admissible; such an agreement is equivalent to accord and satisfaction of the debt sued for, and ought to be so pleaded.

**APPEAL from Harford County Court.**

This was an action of *Debt*, instituted on the 5th of August, 1830, by the appellant against the appellee, on a single bill, dated October the 7th, 1824, for \$172. 79.

The pleadings in the cause are fully set out by the judge who delivered the opinion of this court.

1. At the trial, after the plaintiff had read to the jury the single bill upon which the action was brought, the defendant read a deed to which the plaintiff and himself were parties, dated May 17th, 1830, by which the defendant *Benjamin*, demised to the plaintiff a tract or parcel of land, during the life-time of the defendant, with the appurtenances

belonging to the same. In consideration whereof, the plaintiff covenanted and agreed to pay the defendant \$20 per annum during his life, to furnish him and his wife a comfortable support; and to pay all claims and demands existing against the defendant at the date of the said deed, &c. And for the performance of the respective covenants of the parties, they bound themselves each to the other in the sum of \$300 current money. And the defendant also read in evidence to the jury, a schedule and valuation of various articles of personal property, amounting in the whole to \$178, annexed to which was the following memorandum. “The 17th of May, 1830; be it remembered, that *Benjamin McCreary* and *James McCreary*, both of *Harford* county, and State of *Maryland*, having called on us the subscribers to value the horses, &c. of the said *Benjamin McCreary*, which the said *James* is to take, hold and possess as his property, and only use at the above valuation. In witness whereof, we have hereunto subscribed our names, the day and date above written. *James Deaver. James Montgomery.*” And proved that the articles contained in said schedule, were delivered over at said valuation to the plaintiff, and that the lease or covenants were executed, and appraisement made, and property delivered over at the same time. The plaintiff then offered to prove by the appraisers, that at the time the property in the schedule mentioned, was appraised and delivered to the plaintiff, it was agreed between the plaintiff and defendant, that the value of said property should be applied by the plaintiff to the payment of the outstanding debts of the defendant. The defendant objected to the admissibility of this testimony, and the court (*ARCHER*, Ch. J., and *KELL*, A. J.) sustained the objection, and rejected the proof. The plaintiff excepted.

2. The defendant in addition to the evidence in the first exception, which is made a part of this, offered to prove by a competent witness, that he heard the plaintiff say, some-time about the 1st of June, after the execution of the above mentioned covenant, that he had received the defen-



dant's farm and personal property, on an agreement that he should maintain his father, the defendant, and his mother, for the use of said property, and to pay \$20 per year on account of the stock and other personal property. He the plaintiff was to pay all his father's debts for the use thereof; and if the defendant, his father, should die shortly after that agreement, that the property appraised by *Montgomery* and *Deaver*, was to be retained by him, and to stand in bar between him and his father. The plaintiff thereupon prayed the court to direct the jury, that if they believed the testimony of the witness, the plaintiff is entitled to recover. The court refused this direction, and instructed the jury that if they should believe from the evidence, that the plaintiff was to have the use of the personal property, upon an agreement to pay the debts of his father, the defendant, and that the debt which is the cause of action in this cause, was included among those to be paid, that then the plaintiff is not entitled to recover, but if the jury believe that it was not to be thus paid and settled, but was intended to be excluded from the number of those to be paid, that then, the plaintiff is entitled to recover. The plaintiff excepted.

3. The defendant then, in addition to the evidence in the preceding exceptions, proved by two witnesses, that the plaintiff said, that various articles of personal property, other than those appraised as aforesaid, were delivered by the defendant to the plaintiff, at the same time, which he told one of the witnesses he declined to have appraised; and proved that the plaintiff told another of the witnesses, that he had taken the whole of the personal property of the defendant, and was to pay all his debts, and particularly the debt due to himself was to be discharged.

The plaintiff then prayed the court to direct the jury, that if they believed from the whole evidence in the cause, that the goods given by the defendant to the plaintiff, were given under a special agreement, that the said plaintiff should pay all the defendant's debts, including the demand

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of the plaintiff in consideration of said property, that then the agreement was not admissible in evidence to support the issue on the part of the defendant under his pleas of set-off, which opinion, the court (KELL, A. J.) refused; but directed the jury, that if they find it was agreed between the plaintiff and defendant, that the defendant should deliver to, and the plaintiff receive the personal property spoken of by the witnesses, and in consideration thereof, that the plaintiff would pay the other debts of the defendant, and that the debt now sued for, should also be thereby discharged, and that the said property was delivered accordingly, that then such receipt of the property by the plaintiff, is admissible in support of the issue on the part of the defendant. The plaintiff excepted.

4. After the testimony detailed in the preceding bills of exception, which is to be considered as part of this, had been given, the plaintiff prayed the court to direct the jury, that if they believe the goods given by the defendant, under an agreement that the plaintiff should pay defendant's debts, were not equal in value to the plaintiff's demand, that then the said goods were only a set-off to the extent of the value of said goods. The court (KELL, A. J.) refused this instruction, but was of opinion, and so directed the jury, that if they find the agreement to have been made between the parties, which is mentioned in the *third* exception, and the delivery and acceptance of the property under it as therein stated, that then, such acceptance thereof by the plaintiff is admissible as a set-off to the whole of the debt now sued for.

The plaintiff excepted, and the verdict and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANNAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Learned* for the appellant, filed notes.

This is an action of debt upon a single bill, and the defence relied upon is a plea of set-off for goods sold, &c. under a

special agreement which is offered in evidence under the plea. The record presents two questions for the consideration of the court.

*First.* Did the court below err in refusing the parol evidence offered by the plaintiff, to prove for what particular purpose the goods mentioned in the schedule of appraisement were delivered? *Secondly.* Did the County Court err in permitting the *defendant* to give evidence of a *special agreement*, by which the plaintiff stipulated in consideration of certain goods delivered to him, to pay all the defendant's debts, under a *plea of set-off for goods sold*?

The first question arises upon the first bill of exceptions. The court seem to have excluded the plaintiff's testimony upon the ground, that the schedule of appraisement was the *only* evidence admissible in relation to that transaction. In this we think the court erred; without contravening the rule that parol evidence is inadmissible, where there is written our evidence was offered to prove what did not appear upon the written schedule, to wit, how the price of the goods was to be applied. It was not intended to contradict or vary the written evidence, but solely to prove a collateral matter, that the written evidence did not explain, an agreement between the parties, that the price of the goods mentioned in the schedule, was to be applied to particular objects, and what those objects were. There is a clear distinction between the cases, where the law requires the contract to be in writing, and where it does not require it. In the former case, no parol agreement can be admitted in evidence; but in the latter, a parol co-temporaneous agreement may be given in evidence. 1 *Stark. Cas.* 267. 3 *Stark. Ev.* 1049.

In this case, it is contended that the schedule cannot be considered as the written agreement of the parties, for any other purpose than the mere ascertainment of the value of the goods mentioned in it. It is not signed by the parties, and it would seem that the powers of the arbitrators, so far as they can be regarded, as the agents of the parties did not

extend beyond the mere valuation of the property. No other power seems to have been intended to be given them by the parties. The admissibility of the rest of the agreement is perfectly consistent with the case in *Starkie of Jeffrey vs. Walton*. The agreement to have this property valued, is only part of a parol agreement, embracing many other matters bearing upon the whole transaction, which we contend, it was competent for us to explain by parol proof. It was necessary that the jury should have had this evidence, to enable them to judge of the intentions of the parties, in relation to their whole transactions, in reference to the case before them. In our case, there is no law requiring the sale of the goods to be in writing. If the whole contract in relation to the goods sold had been by parol, it would have been obligatory. It is difficult to conceive how the court could regard this appraisement as a *contract* of that character, that would exclude all parol evidence in explanation of the transaction that does not appear upon its face, and cannot be understood from its terms. It would indeed be strange, if such a writing would preclude either party from shewing by other evidence, under what agreement this appraisement was made.

In relation to the second point, a question of pleading arises, does the evidence offered by the defendant sustain his plea of set-off? His plea is a *general* plea for goods sold, &c. His evidence is a delivery of goods under a *special agreement*, without any evidence of the value of the goods. The general rule upon this subject is, that the evidence must be conformable to the plea, and the same strictness is required in a plea of set-off, as in other pleadings. 3 *Starkie* 1312, *et seq.* The same rule applies to a plea of set-off, that does to a *nar*; and the rule there, is, that if there be a subsisting *special agreement*, the plaintiff cannot declare generally for goods sold. 6 *Harr. and Johns.* 38. In this case the proof is, that goods were delivered under a special agreement, for a particular purpose ascertained by



that agreement, and the *plea* is, that goods were sold and delivered *generally*.

If such evidence were admissible, the plaintiff would be taken by surprise. He would come into court prepared to rebut the sale and delivery of the goods, when, if he had notice that a *special agreement* was to be given in evidence, he would come prepared to disprove or explain that agreement.

It is true, that there are cases where the plaintiff may abandon a special agreement, and recover on the general counts; but there he must recover upon the strength of the testimony that sustains those counts. In this case the evidence is wholly insufficient to entitle him to recover upon the general counts.

The rule, it is believed, is universally true, that where the special agreement is abandoned, and the plaintiff goes upon the common counts, he must show the *value* of the goods, &c. as the case may be. In short, he must give all the evidence necessary to sustain a *quantum valebat*, or *quantum meruit*. How would this evidence stand in a *quantum valebat*? There is no evidence of value whatever. Suppose the defendant had a right to abandon the *special agreement* when we sued him, and to set up the goods sold and delivered as a set-off generally; still he would be compelled to prove, not only the delivery of the goods, but their value. He could not look to the special agreement, to fix the value of the goods, and abandon it as to all other purposes. This rule seems to have been established by this court, in the case *6 Harr. and Johns*. 38, before referred to; that when there is a subsisting special agreement the parties must rely upon it. In the case at bar, according to the proof, the special agreement is subsisting, and the defendant is *obliged* to rely upon it, in fixing the value of the goods. He gives it in evidence, and he should have pleaded it. Without the special agreement it does not appear that the goods delivered were worth any

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thing. The agreement shows, that the plaintiff agreed to pay all the defendant's debts for these goods. This may give a vague idea of their value, but is only ascertained through the agreement, uncertain as it is, and we think even this evidence is clearly inadmissible under the defendant's plea.

All the reasons that support the necessity of a special nar upon a special agreement, apply with equal force and propriety to a plea of set-off.

*Gill*, for the appellee contended,

That the County Court did not err in rejecting the plaintiff's proof, as offered in the first bill of exceptions. The appellant's counsel supposes that the proof was admissible, to show how the property, mentioned in the appraisal, was to be paid for. If the defendant's case had rested upon the appraisal alone, the proposed evidence would have been competent. But the lease is an important part of the case. There the plaintiff had agreed in consideration of the lease, to pay all claims and demands existing against the defendant at its date, 1830. The bond sued on, was dated in 1824, of course the agreement in the lease covered that debt. The plaintiff agreed to pay it by the lease; by that it was extinguished. Now the proof offered, in effect, abandons that stipulation, and proposes to show that for another consideration, the plaintiff must pay the defendant's debts. The lease shows that the land was the equivalent for paying the debts; the parol proof abandons that ground, and insists that the personal property was the equivalent. What is this in effect but interpolating an additional clause in the lease, denying that *all* the defendant's debts were to be paid in consideration of the demise of the land, and declaring that the plaintiff was to receive something else from the defendant, to pay a part of his debts? The appraisal was naturally silent upon this point, because the defendant seeing, that for the land, *all* his debts were to be paid, would expect, of course, payment for the personal

property, the true reason for the valuation. If this view is correct, the plaintiff has no claim, and the cause need not be remanded. Upon the other questions, it is conceded, that it would be difficult to maintain, that the special agreement is competent evidence under the present state of the pleadings.

STEPHEN, J., delivered the opinion of the court.

This was an action of debt instituted in *Harford* County Court, by the appellant against the appellee, to recover a sum of money due on a single bill. The defendant pleaded as a set-off, that the plaintiff was indebted to him in several sums of money of a larger amount, for sundry goods and chattels before that time sold and delivered, for money had and received, for money lent and advanced, for the use and occupation of a certain messuage and land thereunto appertaining, and upon an account stated; and also for the use and possession of several horses, cows, carts, and other necessary farming utensils. To this plea the plaintiff replied, that he was not indebted to the defendant in manner and form as the defendant had alleged; and also that at the time of the impetration of the original writ in this cause, the defendant was indebted to the plaintiff in several large sums of money, for money paid, laid out, and expended, for the use of the defendant and at his special instance and request, for goods and chattels sold and delivered, for work and labor, and for sundry matters properly chargeable in account, which sums of money, or so much as may be equal to defendant's claim, he prays may be discounted out of the money mentioned in said pleas. To this replication, the defendant rejoined the plea of limitations. Upon the trial of the cause, after the plaintiff had read in evidence to the jury the single bill, the defendant offered in evidence, a certain deed of covenant entered into between him and the plaintiff, containing sundry stipulations, and among the number, one to pay all debts and claims that may be standing against him, the said *Benjamin*,

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at the date thereof; and also offered in evidence a schedule, and valuation of sundry articles of personal property; at the foot of which was the following statement, made and signed by the appraisers. "The 17th of May, 1830. Be it remembered, that *Benjamin McCreary*, and *James McCreary*, both of *Harford* county and State of *Maryland*, having called on us the subscribers to value the horses, cattle and hogs of the said *Benjamin McCreary*, which the said *James McCreary* is to take, hold and possess as his property, and only use at the above valuation. In witness whereof, we have hereunto subscribed our names, this day and date above written," and proved that the articles contained in said schedule, were delivered over at said valuation to the plaintiff, and that the lease or covenants were executed, and appraisement made, and property delivered over at the same time. The plaintiff then offered to prove by the appraisers, that at the time the property was appraised and delivered over to him, it was agreed between the plaintiff and defendant, that the value of said property should be applied by the plaintiff, to the payment of the outstanding debts of the defendant; to the admissibility of which evidence the defendant objected, and the court sustained the objection, and rejected the testimony as inadmissible.

Whether or not, the court below were right in rejecting the testimony so offered to be given to the jury, is the question now to be decided. The appraisers' statement amounts to nothing more than a written declaration, that they had been appointed by *James* and *Benjamin McCreary*, to value the specified property, and that *James McCreary* had agreed to take it at the valuation so made by them. In what manner this valuation was to be paid, is not stated by the appraisers. It is therefore considered that no principle of law, or rule of evidence, would be infringed or violated by the admission of parol proof, to ascertain that fact, about which the statement is perfectly silent. The articles mentioned were to become the property of *James*



*McCreary* when paid for at that valuation; but whether they were to be paid for in money or in any other manner, is not stated. Even if this were the case of a written contract signed by the parties themselves, the authorities are clear, that parol evidence is admissible to prove any collateral, independent fact, about which the written agreement is silent; because such proof is perfectly consistent with, and does not in the least tend to contradict, vary or explain the written instrument. Thus it is said in *Philips Ev.* 497, “though an ambiguity apparent on the face of a written instrument cannot be explained by extrinsic evidence, yet where a question arises, as to the general intention of the parties, concerning which, the instrument is not decisive, it has been held that proof of independent facts, collateral to the instrument, may be properly admitted. Thus in the case of *King vs. Laindon*, where on a question between two parishes, respecting the settlement of a pauper, it appeared that the pauper agreed to serve a person three years to learn the business of a carpenter, and evidence was admitted at the sessions, that at the time of making the agreement, the pauper agreed also to give a sum of money as a premium to be taught the trade; that he paid the money, and that he was not to be employed, nor was he employed in any other work, than that of a carpenter; the court of *Kings Bench* held, that the evidence was properly admitted, as it was not offered to contradict the written agreement, but to ascertain an independent fact, collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal.” So, in 3 *Stark. Ev.* 1047, and 1050, it is said, “it may be shown that a parol contract was made, independently, wholly collateral to, and distinct from a written one made at the same time. In such cases the parol evidence is used, not to vary the terms of the written instrument, but to show either, that it is inoperative, as an entire and independent agreement, or that it is collateral and irrelevant.” And in page 1050 in a note it is stated:—“In many

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instances the terms reduced to writing, may constitute but a small part of the real contract. Suppose *A* to let a house by parol to *B*, for two years, and that at the time of the parol agreement, a stipulation as to the furniture is made, for convenience of calculation in writing, and that at the foot of the account is written: “*B* to take the furniture at the above valuation,” it would be difficult to contend, that *B* would be bound to buy the furniture, although *A* refused to let him occupy the house, and that *B* would be concluded by the written part of the engagement from showing the real condition annexed to it.” This court are of opinion, that the court below were right in refusing the plaintiff’s prayer, but erred in the opinion and direction to the jury, given in the second exception. In that exception the defendant, in addition to the evidence offered in the first bill of exceptions, offered to prove by a competent witness, that he heard the plaintiff say sometime about the first of June, after the execution of the covenant referred to in the first bill of exceptions, that he had received the defendant’s farm and personal property, on the agreement that he should maintain the father and his mother for the use of said property, and to pay \$20 per year on account of the stock and other personal property; he the plaintiff was to pay all his father’s debts for the use thereof; and if the defendant, his father, should die shortly after that agreement, that the property appraised by the appraisers, was to be retained by him, and to stand in bar, between him and his brother. Whereupon the plaintiff prayed the direction of the court to the jury, that if they believed the testimony, the plaintiff is entitled to recover; which direction the court refused to give, but directed the jury, that if they should believe from the evidence that the plaintiff was to have the use of the personal property, upon an agreement to pay the debts of his father, the defendant, and that the debt which is the cause of action in this case was included among those to be paid, that then the plaintiff is not entitled to recover; but if the jury believe, that it was not to be thus paid and

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settled, but was intended to be excluded from the number of those to be paid, that then the plaintiff was entitled to recover.

In this opinion we think the court below erred in their direction to the jury, because the defendant was not entitled to avail himself of the benefit of the evidence given in this exception, under the pleadings in this cause. The agreement, to prove which the evidence was offered, being the proper subject of a plea in bar, by way of accord and satisfaction, and not admissible in evidence under the issues in this cause. For the same reason, we think the court below erred in the opinion delivered by them in the third exception. The agreement therein offered to be proved, being properly pleadable as aforesaid in bar, and not admissible in evidence under the pleadings in the cause. We also think that the court below were right in refusing the plaintiff's prayer, but erred for reasons similar to those already expressed in the direction given by them to the jury in the fourth exception, and reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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THE MARYLAND INSURANCE COMPANY, AND PHOENIX  
FIRE INSURANCE COMPANY vs. BATHURST, surviving  
Partner of THOMPSON.—June, 1833.

The *sentence* of condemnation of a foreign prize court is evidence of the facts which it purports to decide, in an action on a policy of insurance on the thing condemned, and was conclusive evidence thereof, until the act of 1813, *ch.* 164, reduced it to the character of *prima facie* proof; but the proof upon which such sentence may have been predicated, is not, *per se*, admissible in such collateral action.

The record of the proceedings of a foreign court of admiralty, containing copies of various documents, and reciting the proofs of the originals thereof being found on board of a vessel, condemned by such court, at the time of

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her capture, is not evidence that such documents were so found, in an action upon a policy of insurance to recover the value of the condemned vessel. Where the sentence of a Court of Admiralty condemning a vessel, recited that *at the date of the decree*, the port which such vessel had attempted to enter was blockaded, evidence that *at the time of her capture*, such port was not in fact blockaded is immaterial and irrelevant, in an action upon a policy to recover for a total loss arising from the condemnation, and although the County Court permitted such evidence after objection to go to the jury, yet it is not error for which this court would reverse the judgment. The party who offers the decree of a foreign Court of Admiralty in evidence, as proof of the loss of his vessel condemned thereby, may, since the act of 1813, contradict by proof, the facts and circumstances upon which such decree professes to be founded, where such facts are in issue between the parties to the cause in which the contradictory proof is offered.

Where the insured is informed of the loss of his vessel by capture, he need not abandon to the underwriter: but may wait to ascertain whether his property is condemned, and then claim to be paid.

If in a reasonable time after notice of capture, the insured fails to abandon, he loses the privilege of doing so, and cannot recover for a total loss on any abandonment for that cause subsequently made.

In recovering for a total loss founded upon an abandonment, the insured must prove as the basis of his action, the cause assigned in the notice of abandonment.

An order for insurance against all risks for account of whom it may concern covers belligerent as well as neutral risks; and an endorsement upon such an order, stating, "although our advices give us no reason to believe that there will be any articles contraband of war on board, still as we wish to be covered against all possible risk, we request your re-consideration of the within, including articles contraband of war," does not alter the character of the original application, nor constitute a warranty or representation of neutrality.

A court of justice may, in its discretion, content itself with a simple refusal of any prayer not sanctioned by the rules of law.

Facts of universal notoriety in the commercial world, at the time of effecting an insurance upon a particular voyage, which relate to the course of trade upon such voyage, which form a part of the public history of that time, are lights, against which a court of justice cannot shut its eyes, and of which the law imputes knowledge to underwriters.

Where an order for insurance is against all risks, or all possible risks for account of whom it may concern, upon a certain defined voyage, the insured is not bound to communicate or disclose at the time of effecting such insurance without inquiry from the underwriter, the particular circumstances connected with the voyage, which show that it is in fact a belligerent risk, as the transportation of hostile stores, troops, &c.



The obligation to disclose facts to an underwriter, is limited to such facts as would vary the risk or nature of the contract; no communication need be made of what is necessarily implied by the contract.

The *English* rule, that the right to recover for a total loss is not made absolute by the state of the facts on which the abandonment is founded, continuing to exist at the date of the abandonment, but is dependent on subsequent events, does not prevail here.

The right to recover of the assurer for a total loss is complete, if the loss, which is the basis of an abandonment, continues at the time of the abandonment, and of this consummate right or privilege, the assured cannot without default be deprived, but by his consent expressed or implied. It may be waived like other privileges.

If after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or re-taken by the crew, or be recovered and delivered to the owners who claim and use her as their own, they possess her under no new title or right of property; and this constitutes a waiver or surrender of the abandonment.

But where a condemnation takes place, the assured, apart from all statutory regulation on the subject, is divested of all property in the ship; and in it, if purchased by themselves or their agents, they acquire a new and independent title, to which their subsequent acts of ownership are imputable, and not to their original proprietary rights. And this new title, against all the world save the underwriters, is incontrovertible; and it is conclusive against them, if they consented to its acquisition, or have waived the right to impeach it.

So where the insured vessel was captured and condemned, and purchased by the master, who drew upon his owners for the amount, and information of these facts was communicated to the underwriters at the time of making a claim for a total loss, and the underwriters did not claim the purchase, but contested their liability upon the ground of not having seen the protest of the captain; it was HELD, that they had waived their right to consider the purchase as made for their account, and could not at the trial insist that the insured had only suffered a partial loss, but were liable for a total loss.

Where notice was given to underwriters of a claim for the condemnation of the insured vessel, and they at first demanded the captain's protest, and after some correspondence the underwriters notified the insured that "they did not consider themselves answerable for the claim," this was HELD, to be a waiver of all objection to the preliminary proofs offered by the assured.

#### CROSS APPEALS from *Baltimore* County Court.

These were actions of *Covenant* instituted by *Thompson & Bathurst*, against the Insurance Companies, on the 17th

March, 1824. *Thompson* died pending the causes. Issues were joined upon the pleas of *non infregit conventionem*.

The following statement is from the record in the case of the *Maryland* Insurance Company, from which the other is not supposed in principle to be distinguishable. These causes were argued, and decided together in the Court of Appeals.

1. At the trial the plaintiff read in evidence to the jury, the following policy of insurance.

“By the *Maryland* Insurance Company, (No. 8881.) Whereas *Thompson & Bathurst*, for whom it may concern, do make insurance, and cause themselves to be insured, lost or not lost, at and from *London* or *Antwerp* to two ports on the *Spanish Main*, and at and from thence to a port in the *United States*, upon the body tackle, &c. and freight of the good ship called the *Budget*, whereof is master *John Meany*, or, &c. beginning the adventure upon the said vessel, &c. at and from *London* or *Antwerp* aforesaid, and so shall continue and endure until the said vessel be safely arrived at a port in the *United States* aforesaid, and until she be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, her tackle, &c. for so much as it concerns the assured, by agreement made between the assured and assurers, in this policy, are and shall be valued at without any further account to be given by the assured and the assurers, or any of them for the same. Touching the adventures and perils which we the assurers are contented to bear and take upon ourselves in this voyage, they are of the seas, men of war, fires, &c. taking at sea, arrests, &c. all kings, people of, &c. barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof. And in case of any loss or misfortune, it shall be lawful to and for the assured, their

factors, servants and assigns, (and the assured on their part agree and engage by themselves, their factors, servants or assigns) to sue, labor and travel for, in and about the defence, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance,—to the charges whereof, we the assurers will contribute according to the rate and quantity of the sum herein insured. And so we the assurers are contented, and do hereby bind the *Maryland* Insurance Company to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for the assurance, by the said assured, or their assigns, after the rate of ten per cent. to return five per cent. if the risk end at the first port; if at the second, two and one-half per cent. On vessel, \$3,000—valued at ten thousand dollars. On freight, 2,000—or the proceeds thereof valued at four thousand dollars—\$5,000. And in case of loss, such loss to be paid in ninety days after proof and adjustment thereof; the amount of the note given for the premium, if unpaid, being first deducted. In witness whereof, the *Maryland* Insurance Company have, by their president, subscribed the sum insured, and caused the common seal to be annexed to these presents, in *Baltimore*, the 10th day of October, one thousand eight hundred and twenty-two.

“MEMORANDUM.—1. It is agreed by and between the assured and assurers, that no loss shall be paid on any average under five per cent., unless said average be general. 2. It is further agreed, that if any dispute shall arise relating to a loss on this policy, it shall be referred to two persons, one to be chosen by the assured, and the other by the president of the *Maryland* Insurance Company, for the time being, which two persons shall have the power to adjust the same; but in case they cannot agree, then these two persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties. 3. If the above vessel, after a regular survey, shall

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be condemned for being unsound or rotten, the company shall not be bound to pay their subscriptions to this policy. 4. It is also agreed between the assured and assurers, that in all cases of return premium, one-half per cent. upon the sum insured, shall be retained by the assurers. 5. It is mutually agreed by the parties to this policy, that no part of the premium shall be returned or abated, on account of any deviation which shall be made by the owners or their factors, from the present voyage. 6. Warranted by the assured free from any charge, damage or loss, which may arise in consequence of seizure or detention of the property, for or on account of any illicit or prohibited trade. And in case of capture or detention, the assured renounces all claim against the company for damage, seamen's wages or provisions : and should the said ship not be heard of within twelve months from the time she leaves her last port, then she shall be deemed a loss, which the company engages to pay without further delay.—(\$5,000.)—Five thousand dollars. *John Hollins, Prest.*”

And the order on which the same was founded, which is in the following words :—“Extract of a letter received from Capt. *John Meany*, of the ship *Budget*, dated *London*, 3d and 4th September, 1822. I have chartered the ship to go from this *port* or *Antwerp*, to one of the following ports in the *Colombian* government—*Laguira*, *Porto Cabello*, *Santa Martha*, or *Carthagena*. We commence loading this day, and will dispatch immediately. The ship is in complete order—stands A, No. 1 at *Lloyd's*—has been docked, caulked all over, coppered with 24 oz. copper—has two suits of sails, one almost new ; 4 anchors, and 4 cables, two of the cables chain. She has been put in complete order in rigging, &c. If she should go to *Antwerp*, which is not probable, I will get the insurance done here ; so that you will make the insurance from either of those ports,—say \$8,000 on ship, and \$2,000 on freight. As some freight may offer at *Laguira*, that would prevent my returning to the *United States*—in that case there should be a return premium.”



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“Insurance is wanted as above, *against all risks, for account of all whom it may concern*, and in case of loss, the amount to be paid *us* on the above named ship *Budget*, \$8,000, valued at \$10,000, and freight \$2000, or the proceeds thereof, at and from *London or Antwerp*, to one or two of the above named ports on the *Spanish Main*, and at and from thence to a port in the *United States*, expected to be *Baltimore*. What return if only one port on the *Spanish Main* is used, and what return, should the risk end there? *Thompson & Bathurst. Baltimore, Oct. 9th, 1822. “Answer.”* Freight valued at \$4,000; 10 per cent—to return 5 per cent. if the risk end at the first port; if at the second,  $2\frac{1}{2}$  per cent.”

Which said order, with the offer of the defendants noted thereon, was on the following day, to wit: the 10th October, again presented to the defendants by the plaintiffs, with the following endorsement:—“Although our advices give us no reason to believe there will be any articles contraband of war, on board the ship *Budget*, still, *as we wish to be covered against all possible risk*, we request your reconsideration of the within application, including articles contraband of war. *T. & B. October 10th.*”

To which an answer was returned by the defendants in the following words, written on said order, viz: “As yesterday, including articles of war, \$3,000 on the vessel—\$2,000 on the freight.”

And the same was accepted by the plaintiffs, in the following words, viz: “\$5000 is accepted. *T. & B.*”

And the plaintiff also gave in evidence the following letters, which were admitted to be the whole correspondence between the parties.

“*Baltimore, 12th March, 1823. To the President and Directors of the Maryland Insurance Company,—Gentlemen: Having received advice from Captain Meany, that he had purchased the ship Budget, after her being condemned and drawn on us for amount of costs and disbursements,*

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we wish to know if we may calculate on receiving from you the amount insured in your office, at the stipulated time expressed in your policy—say 90 days from proof of loss. We remain, most respectfully, your obed't servants, *Thompson & Bathurst.*”

“Office of the *Maryland Insurance Co.* 12th March, 1823.—Gentlemen: In reply to your note of this date, we have only to state, that not having seen Captain *Meany's* protest, we cannot satisfactorily make you a reply, because on it mainly depends the ground for payment, which (when presented) if found in order, the loss is payable in ninety days after proof and adjustment thereof. Very respectfully, &c. *John Hollins*, President. (Endorsed) “Messrs. *Thompson & Bathurst, Baltimore.*”

“*Baltimore*, May 7th, 1823. To the President and Directors of the *Maryland Insurance Co.*—Gentlemen: We abandoned to you on the 6th February last, the ship and freight of ship *Budget*, insured in your office by policy No. 8881, and at same time handed you a certified copy of the condemnation of said ship at *Porto Rico*. The period of time required by your policy for payment of loss, after proof thereof, having now expired, we beg leave to call upon you for the amount thereof. We remain, gentlemen, your obedient servants, *Thompson & Bathurst.*”

“7th May, 1823. Messrs. *Thompson & Bathurst*,—Your favor of this day has been received, and has had the attention of the board of directors, in reply to which they refer to their note to you of the 12th March past, respecting the claim you call for, on the ship *Budget* and freight insured by this company in policy No. 8881. Being still without a protest and copy of the proceedings of the court at *Porto Rico*, no claim can possibly lay against us; *but as the vessel is now here, no doubt they can be produced.* It is important also to see the log book. *Jno. Hollins*, President.”

“*Baltimore*, 21st May, 1823. To the President and Directors of the *Maryland Insurance Co.*—Gentlemen: Having handed you all the documents we have received, re-

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specting the capture of the ship *Budget*, insured in your office, and which we presume you will find conclusive, we have now to request you will arrange and settle with us for the loss. Should you deem any other documents as necessary to *elucidate* the condemnation of the ship, by your pointing them out to us, we will undertake to get them within a reasonable time, if it be possible to procure them. We remain with respect, your obed't servants,

*Thompson & Bathurst."*

"24th May, 1823. Messrs. *Thompson & Bathurst*,—Your letter of the 21st inst. has had the attention of a full board of directors, who have instructed me to inform you that they will advance to you \$4,498.75, on receipt of your and *R. Oliver's*, Esq. joint note at six months, bearing interest; at the expiration of which time, or sooner if convenient, you are required to produce to this company the following documents, relative to the ship *Budget*, viz: the proceedings of the court at *Porto Rico*, the *log book*, or an authenticated copy thereof; the charter party, or copy authenticated; upon the receipt of which, and their proving satisfactory, an adjustment of the loss will take place.

*Jno. Hollins*, President."

"*Baltimore*, 26th May, 1823. To the President and Directors of the *Maryland Insurance Co.*—Gentlemen: We have received your respected letter of the 24th inst. to which we pay due note. Although we consider the proofs already handed you as fully establishing the capture and condemnation of the ship *Budget*, still we do not hesitate in trying to procure the documents you have pointed out as necessary, and have therefore written for them by a vessel that sailed yesterday for *Porto Rico*.

We should esteem it an accommodation, your now paying us the loss in the same manner the *Phœnix Insurance Company* have done, viz: by our giving our note for the same at six months date, with interest, being as a security for our procuring such further documents as may be requisite; but we prefer forfeiting that temporary advantage to giving

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a note in the manner you prescribe. We remain with respect, gentlemen, your obed't serv'ts, *Thompson & Bathurst.*"

28th May, 1823. Messrs. *Thompson & Bathurst*,—Your respects of the 26th instant have had the attention of the Directors of this company, who have instructed me to inform you, that the proofs produced in the case of the ship *Budget*, are not satisfactory, or such as are usually produced by the assured in similar cases, to entitle the assured to claim a total loss; on that score, we beg to refer you to our letter of the 24th, and what we verbally communicated some time ago: with respect to an accommodation, we have no objection to grant one to the extent treated of in our last, on your note with satisfactory security, which is in conformity with the custom of this company, and from which we cannot deviate; at the same time we wish you to understand, that it is neither meant nor intended *as paying a loss*, which in our opinion is not fully established. Should you not approve our terms, you will of course have to wait until the documents sent for are received, and when received, if satisfactory to this company, no unnecessary delay will be made in paying the loss. *Jno. Hollins*, President."

"*Baltimore*, 22d August, 1823. Messrs. *Thompson & Bathurst*,—Gentlemen: Our respective boards of directors have required of us, that the *Spanish* documents, purporting to be the proceedings of the Court of Admiralty in *Porto Rico*, respecting the condemnation of the ship *Budget*, be returned to you to be translated into *English*, which we now do, and the sooner it is done, the sooner we shall be enabled to obtain the opinions of our boards, and hand you a copy thereof. With respect to the log book, as it appears the mate or the sailing master of the *Budget* took it, we expect it will be found and produced, as noticed in our former communications, it being of material consequence to the adjustment of the claim. Very respectfully, &c.

*Jno. Hollins*, President of the *Maryland Insurance Co.*  
*D. Howland*, Pres't of the *Phœnix Insurance Office.*"



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“4th March, 1824. Office of the *Maryland Insurance Co.* Messrs. *Thompson & Bathurst*,—Gentlemen: The board of directors have instructed me to inform you, that they do not consider the company answerable for the claim you make, for the ship *Budget* and freight insured by policy No. 8881. This opinion they have formed from the advice given by Mr. *Wirt*, and Mr. *Purviance*, who have had the case under consideration. I am also instructed to say to you, that if your note in favor of Messrs. *Robt. and John Oliver*, and by them endorsed, for \$4,498.75, with interest and cost of protest, be not taken up and paid at the Bank of *Baltimore*, where it now lays, on or before the 10th inst. it will be handed to Mr. *Purviance*, to be put in suit against you and those gentlemen. We hope you will prevent this unpleasant business, but if not, you well know the blame will not be chargeable to this company. Very respectfully, &c. *Jno. Hollins*, President.”

“To the President and Directors of the *Maryland Insurance Co.*—Gentlemen: We have to acknowledge the receipt of your letter of the 4th instant, by which, we are sorry to learn, you still seem determined not to admit your liability for the loss of the ship *Budget*, condemned at *Porto Rico*. We had hoped, that the very clear and decided opinions handed you, of Messrs. *Ogden* and *Binny*, (lawyers considered as the best informed in this country on marine insurance,) would have removed all doubts, and have been conclusive on that subject. It is extremely unpleasant to us, being under the necessity of resisting the payment of our note, which our counsel have advised us to do; at the same time, we feel confident the result will prove we are in the right, and justifiable in so doing. We remain, gentlemen, with great respect, your obed’t serv’ts,

*Baltimore*, 9th March, 1824. *Thompson & Bathurst.*”

The following admissions and agreements, were then read to the jury.

1. It is admitted, that the paper marked C is the order for insurance, submitted by T. and B. to the defendants, when

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application was made for this insurance, and is the order upon which the policy was executed. That the defendants may plead the plea of *non infregit conventionem*, short; and under that plea may give in evidence in their defence, any matters which could be presented, by pleading specially any of the following defences, numbered from 1 to 10 inclusive, and may put *in form*, any pleas embracing these particular defences, at any time before the record is made up for the Court of Appeals, if any appeal should be prayed on either side; and in case such pleas should not be put *in form*, the plea of *non infregit*, with leave as above, shall be understood to cover the following defences; and errors in pleading are, hereby, on both sides released.

*Defence 1.* That the defendants (underwriters) are discharged by the transportation of munitions of war, as set forth in the sentence of condemnation.

2. By the breach of blockade, committed in attempting to enter *La Guira*.

3. By the fact of the destination of the ship, as a member of the *Colombian* squadron, as stated in the record.

4. By the transportation of mariners or soldiers, disguised on the *Role d' Equipage* of the *Budget*, for the service of the *Colombian* government.

5. By the carrying of dispatches from the agents of the *Colombian* government in *London*, to the agents or officers of the government of *Colombia*, in *Colombia*.

6. By concealing circumstances material to the risk.

7. By misrepresentation upon the part of the assured, of facts material to the risk.

8. By a violation of warranty of neutrality, or of a representation of neutrality, made by the assured.

9. By the neglect of the plaintiffs to offer sufficient preliminary proofs.

10. That the plaintiffs can only recover for a partial loss.

II. It is admitted that the *Budget* was, *in fact*, at the time of the effecting of the policy of insurance in this case, and for a long time before, an *American* ship, and always had been so from the time of her being built. That *Hugh*

*Thompson*, of the firm of *Thompson & Bathurst*, was, at the time of effecting this policy, her owner, and that at that time, and for a long time before, her register stood in his name, and so it appears at the Custom House in *Baltimore*. That the said *Thompson* then was, and had been for a long time before, a citizen of the *United States*, resident in *Baltimore*. That *Thompson & Bathurst* were at the time aforesaid, and had been for a long time before, resident merchants, trading and carrying on commerce in *Baltimore*. That Captain *John Meany* was also at that time, and for a long time before, a citizen of the *United States*, resident (when in the *United States*) at *Philadelphia*, and had been for many years in the employ of *Hugh Thompson*, and that at the time of effecting this policy, war existed between *Spain* and the government of *Colombia*.

III. It is admitted that the record marked A, which purports to be a record of the proceedings of the Prize Court at *Porto Rico*, which condemned the *Budget* as hereinafter set forth, was delivered by the plaintiffs to the defendants, upon requisition of the defendants, in the letter of 7th May, 1823, and it is admitted the said record is duly certified.

IV. It is admitted by the defendants, that the paper marked S, purporting to be a decree or sentence of condemnation, made by the Prize Court of *Porto Rico*, is duly certified, and is to be read in evidence in this cause on the trial, and is the paper which was transmitted to the defendants at the time of the abandonment.

V. It is admitted, that the entire cargo of the *Budget*, consisted of munitions of war, and that the brig *New Orleans*, was a *Colombian* ship of war, and that Mr. *Zea*, was the agent of the *Colombian* government.

VI. It is admitted, that at the time this policy of insurance was effected, the *Budget* was in good safety at *London*, and sailed from thence on the voyage insured, and on that voyage, was met off *La Guira* by a *Spanish* privateer, and carried by her into *Porto Rico*, where she was con-



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demned, as set forth in the record marked S, referred to in number IV, of this agreement, and that the plaintiffs, on the sixth day of February, 1823, abandoned to the underwriters.

The above agreement is made in both cases, except so much of the second article as relates to the ownership, which it is agreed is to be open to controversy on both sides, in both cases.

And the plaintiff then offered in evidence the following sentence: "Sentence—*Puerto Rico*, 23d December, 1822. Seen this summary instruction. Judgment respecting the capture of the corvette *Budget*, coming from *New Orleans*, under the command of captain *John Meany*, on the 1st instant, by the *Spanish* privateer schooner, called *Cora*, or *Beunos Amigos*, armed in this place, under the command of captain *Don Juan Esiga*. Taking into consideration the contents of the navigation documents, and others found on board, with the declarations taken in the act of capture, and those now rendered in this tribunal, the captains, captor, and captured, second mate of the corvette, and prize master, *resulting in the whole*, that this vessel departed from *London*, on the 11th October last, *with a cargo of ammunitions of war*, the property of private individuals, residents of that capitol, who directed the same to *Caracas*, to be delivered to Messrs. *Jones, Powles, Hurry & Co.* with destination for *La Guira*, now a blockaded enemy's port, in order, that agreeably to *Mr. Zea's particular intention*, the *Colombian navy* may be put on a respectable footing, and that at the same time the brig *New Orleans* be armed; that a regular deposite of these articles may be established at *La Guira*, for the general use of the service, into which port the said corvette endeavored to enter, the said captain having orders, in case he found the same actually blockaded, to proceed with the cargo to *Santa Martha*, a port also occupied by the insurgents, and comprehended in the same declaration, where he was to unload, leaving them for the direction of the mentioned individuals of *Caracas*; that the same corvette to be offered for the service of



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*the said squadron, when wanted*, particularly to recommend the same captain *Meany* to be employed in the same marine, with several other remarks contained in the same documents, which manifest the decided protection, the *European*, *English*, and the *Anglo Americans*, bestow on the insurgents of the continent, against all the rights, and which has been worth consideration in such a short term. His excellency agreed to declare, as in fact he declares, as good prize, the said corvette *Budget*, with the utensils, rigging, cargo, and every other thing she possesses, with regulation, to the last ordinance for privateering, and in the terms prescribed by the royal order, (of the 9th Feb. 1816,) the captured captain, his officers, and crew of the corvette, remaining at the disposal of his excellency, the superior political chief governor of this province, with regulation to the contents of the 58th article of the same ordinance. Thus provided, ordered, and signed by his excellency *Don. Franciscus Marcus Santarda*, honorary magistrate of the most excellent constitutional audience of the territory, and judge de *letras* of this capital, and its districts, which the notary certifies. *Franciscus Marcus Santarda. Jose Maria Leda du Urbina, Royal Notary.*"

Which sentence was enclosed to the underwriters in the letter of abandonment of the 6th of February, 1823; and was delivered to the defendants on the day on which it bears date. The defendants then produced *Thomas Parker* and *David Winchester*, who proved that it was the usage of underwriters to call for the production of the log book, as part of the preliminary proof, in all cases where it was considered necessary to satisfy the underwriters with regard to the claim of the assured, and that they knew of no instance, in which such a call had not been complied with, and that they would consider the underwriters as justified in refusing to pay a loss, in a case where the production of the log book had been demanded and refused, or its non-production not accounted for. And also proved, that the protest, and proof of interest according to

the usage of the insurance offices in *Baltimore*, are the only usual preliminary proofs, and that the log book is never produced unless when called for. Whereupon the defendants, by their counsel moved the court, that the plaintiffs had not offered the necessary preliminary proofs to enable them to maintain this action; but the court (ARCHER, Ch. J.) was of opinion, that the proofs offered were sufficient, the defendants having waived all objection to their sufficiency, by their letter of the 4th March, 1824, herein before set forth. The defendants excepted.

2. The defendants, to support the issue on their part, offered in evidence the copy of the record of the Prize Court of *Porto Rico*, which it is admitted, is duly certified and authenticated, and is the same paper delivered to the defendants by the plaintiff, in pursuance to the letter of the 24th May, 1823, from defendants to plaintiffs, and of their answer of the 26th May, 1823, for the purpose of showing that the original papers of which copies and translations purport to be inserted in said record, were on board the said ship *Budget*, at the time of her capture, and were acknowledged to have been so on board by the said *Meany*, the captain of said ship, in his examination upon oath, before the said Prize Court. To the admissibility of which record for the said purposes, the said plaintiff by his counsel objected, and the court sustained said objection, and refused to permit said record to be read in evidence to the jury for said purpose. The defendants excepted.

3. In addition to the matters offered in evidence by the plaintiff, which are stated in the defendants' first bill of exception, and hereby made a part of this exceptions, the plaintiff further to support the issue on his part, offered to swear *John D. Danels* as a witness to prove that the blockade mentioned in said sentence, as one of the grounds of condemnation, did not at the period of time therein referred to, exist in point of fact. To the admissibility of which evidence the defendants by their counsel objected, because the said sentence of condemnation, had been offered and re-

lied on by the plaintiff as evidence in support of the issue on his part, as stated in the defendants' first exception. But the court overruled the said objection and permitted the witness to depose to the said fact. The defendants excepted.

4. The defendants, in addition to all the matters stated in the foregoing exceptions, and which are hereby made a part of this exception, offered in evidence the following letter, which it is admitted was written by *Thompson & Bathurst*, and received by *John Meany*, the captain of the said ship *Budget*. "*Baltimore*, Nov. 27th, 1821. Captain *John Meany*, supercargo of the ship *Budget*: Dear Sir—On the arrival of the ship *Budget* at *New Orleans*, we leave to your good judgment to freight, or charter her in such manner as you may consider will be most advantageous for the concerned. Wishing you a pleasant and prosperous voyage, we remain your obd't h'ble servants. *Thompson & Bathurst*."

And also offered in evidence the following letter from *Hugh Thompson* to said *Meany*, which it is admitted was written by said *Thompson*, and received by said *Meany*.

"*New Orleans*, April 29th, 1822. Mr. *John Meany*: Sir—You will proceed in the ship *Budget* for *London*, and there deliver the goods on freight. Dispose of the staves to best advantage, and employ the ship either by freighting or any other way you think will be to our interest. If you should go to *Bordeaux*, call on our friends there, who will assist you in getting a freight to the *United States*. Write by every opportunity. If your captain does not suit, you are at liberty to discharge him. Wishing you a pleasant and prosperous voyage, I remain your obd't humble ser'vt. For *Thompson & Bathurst*. *Hugh Thompson*."

And also gave in evidence by the testimony of several witnesses, who had been for many years engaged in underwriting, that in *their judgment*, the non-disclosure of the fact, that the vessel on which insurance is asked, is to be *entirely* laden with articles contraband of war on the voy-



age insured, would in the general opinion and judgment of underwriters, influence their judgment, and induce them to demand a lower premium, than if such fact was communicated. And the defendants further gave in evidence, that if at the time the said order was given, and policy effected, it had been known that the said ship would be *entirely* laden with munitions of war, to be used for the service of the *Colombian* government at *La Guira*, partly to arm a vessel of war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La-Guira* for the service of said government; that the said ship *Budget* was to be offered for sale to the said *Colombian* government, whenever she might be wanted, and that the said *Meany* was to be employed in the naval service of said government, that the knowledge of said facts, or either of them, in the general opinion and judgment of underwriters, would have induced the defendants to decline said risk altogether, or to charge a much higher premium, than that for which said insurance was effected; and the defendants further proved by the testimony of *Baptist Mezick*, that the said ship *Budget* was, when built, pierced for guns, and was readily convertible into an armed ship. And the plaintiff, further to support the issue on his part, read in evidence to the jury the order for insurance, with the endorsement thereon, which it is admitted were presented by *Thompson & Bathurst* to the *Maryland* Insurance Company, on the days of their respective dates, and that insurance was thereupon effected by the said company, for the premium stated at the foot of the first of said orders, as inserted in defendants' first exception.

And the defendants proved by *Henry Thompson*, a witness sworn in the cause, that he was a director in the *Baltimore* Insurance Office, on the 9th October, 1822, when an order, precisely in the same terms to that first laid before the *Maryland* Insurance Office, was presented to the *Baltimore* office; that after the adjournment of the board on that day, the witness met the said *Bathurst*, one of the



firm of *Thompson & Bathurst*, and told him from his knowledge of *Captain Meany*, he thought it probable there would be contraband on board the said ship on said voyage, and that by the order of insurance presented to the said *Baltimore* office, the said *Thompson & Bathurst* would not in that case be covered, and that thereupon the said *Thompson & Bathurst*, on the succeeding day, presented the explanatory order endorsed on the said first order; and also offered evidence to prove, that according to the usage and practice of underwriting in *Baltimore*, when it is intended the policy shall cover contraband, that fact is always stated by the party offering for insurance.

And thereupon the *plaintiff* offered in evidence to the jury, the following letters and endorsements:

“*London*, September 3d, 1822. Messrs. *Thompson & Bathurst*: Gentlemen—I wrote you stating that I was disappointed in not getting the freight I expected to *Philadelphia*, and waiting for that freight prevented my going to *Bordeaux*, where a freight was ready for me; in the mean time, I had an application from *Hamburg*, to go there, and load for *Vera Cruz*. The agent and myself agreed on £1800 sterling. I waited a reasonable time, and not receiving an answer, I chartered the ship to go from this port, or from *Antwerp*, to one of the following ports in the *Colombian* government,—“*La Guira*, *Porto Cabello*, *Santa Martha* or *Carthagera*, and to receive £1050 sterling, and they pay all the port charges. We commence loading this day, and will despatch immediately. The ship is now in complete order. I will take the command: the captain I discharged, he being indolent, and bad habits, which endanger our lives. I have had only two men on pay during our stay in this place. From *La Guira*, or port of discharge, I intend going to a port in the *United States*—*Norfolk*, or *Baltimore*, will have a preference. I am now making arrangements to place to your credit £200 sterling, which, with the premium, you will place to the credit of ship *Budget*. I would recommend your making insurance on said ship, at, and from

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either *London* or *Antwerp*, to one of the following ports : *La Guira*, *Porto Cabello*, *Santa Martha*, or *Carthage*, and from the port of discharge to the *United States*, *Norfolk* and *Baltimore* will have a preference. The *Budget* stands A, No. 1 at *Lloyds* : she has been docked, caulked all over, coppered with 24 oz. copper. She has two suits of sails, one almost new ; 4 anchors, and 4 cables, two of the cables chain. She has been put in the completest order in rigging—and in short, in every thing to make her complete. I will ship this day a mate well acquainted with that coast. Under all those circumstances, no doubt you will have the insurance done reasonable. Mr. *Henry Thompson* is well acquainted with the ship, and I suppose, in the office he is in as director, she would be done the most reasonable. Some freight may offer in *La Guira*, that would prevent my returning to the *United States*. In that case there should be a return premium—there is not much prospect of such a thing taking place. There is little doubt but we will sail from this port direct to *La Guira*. *John Meany.*” Endorsed, Rec’d 9th October, 1822.

“*London*, September 4, 1822. Messrs. *Thompson & Bathurst*,—I wrote to you yesterday by this opportunity, stating the particulars relating to the ship *Budget*, and her destination to *La Guira*, from *London*, or from *Antwerp*. If she should go to *Antwerp*, which is not probable, I will get the insurance done here, so that you will make the insurance from either of the ports, say \$8000 on ship, and \$2000 on freight. Yours truly, *John Meany.*”

And also proved they were in the hand writing of said *Meany*, and that they were received at the time endorsed upon them, but which said letters were never communicated to the defendants before the policy in question was executed, except so far as they are contained in the extracts accompanying the order herein before mentioned ; and also proved, that the printed forms of policies, in all cases made by defendants, contained the following warranty, to wit : “Warranted by the insured free from any charge, damage

or loss, which may arise in consequence of seizure or detention of the property, for, or on account of any illicit or prohibited trade." And also gave in evidence to the jury, by *Henry Thompson*, a merchant of *Baltimore*, that at the time this policy was effected, there was not sufficient trade between *London* and *La Guira*, to employ a vessel of the size of the *Budget*, except a part of the cargo consisted in articles contraband of war; and the said *Henry Thompson*, in giving the reasons for his opinions, why he supposed that the order for insurance, as originally presented to the *Baltimore* office, of which he was a director, was intended to embrace contraband of war, stated, that he believed a full cargo for a vessel of the size of the *Budget*, could not be obtained to be carried, or brought from *London* to *La Guira*, without containing a considerable portion of contraband articles. And also gave in evidence to the jury, by the testimony of several underwriters of great experience, that in their judgment the disclosure or non-disclosure of the fact, that the vessel on which insurance is asked, is to be laden entirely of contraband of war, on the voyage insured, would be wholly immaterial, and would not increase or diminish the premium asked, where the order requests to be insured against contraband, or against all risks. That *General Morales*, commander in chief of the royal forces of *Spain*, in that part of the government of *Colombia* where the ports of *La Guira*, *Porto Cabello*, *St. Martha*, and *Carthagena* are situated, published about September, 1822, a declaration that the said ports were in a state of blockade, and which was circulated in the *American* newspapers, and that there was a general impression and belief, among the merchants in this country, that the said blockade was not maintained by any adequate force, and that the same amounted only to what is usually denominated a paper blockade; and that although they, the *Royalist Spaniards*, did not maintain such blockade by any actual force, yet that the *Spanish privateers* captured all vessels they fell in with, going to or from those places,



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and the prize courts of *Porto Rico*, a *Spanish* island, condemned them, whether they had contraband on board or not, and that premiums of insurance were charged by the underwriters accordingly ; and also proved that *La Guira* was one of the places included in such paper blockade ; and also proved, that the ship *Budget* was built for, and used as a merchantman, and not peculiarly fitted for a vessel of war ; and also proved, that she was a fast sailer, and that the premium of insurance on her, for the whole voyage described in the policy, if the sea risks only had been intended to be covered, would not have exceeded four per cent : and also offered in evidence, that the vessels loaded with the munitions of war, and the munitions themselves, from the *United States* to *La Guira*, and with liberty of another port on *Spanish Main*, and back to the *United States*, were insured on the whole voyage round at six per cent,—and that the risk from the *United States* to these places, was as great, if not greater, than from *London* to these places. And *the defendants*, for the purpose of showing that vessels laden in part with contraband, and destined to ports in *Colombia*, or other ports in *Spanish America*, were, when met with by *Spanish* vessels of war, and privateers, suffered to proceed after taking out the contraband, with the rest of their cargoes being innocent, offered as a witness to the jury, *Thomas Parker*, President of the *Universal Insurance Company*, who testified that in May, 1823, the schooner *Hunter*, *Captain Hull*, bound from *Baltimore* to *St. Martha*, *Carthagen*a, and other places on the *Main*, partially laden with contraband, was captured by a *Spanish* privateer, and taken into *Havana*, where prize proceedings having been instituted, the contraband articles were condemned, and the residue of the cargo with said schooner released. And also offered as a witness *Richard H. Douglass*, who proved that the brig *Morris*, *Captain Bodily*, bound from *Baltimore* to *Vera Cruz*, having on board a number of muskets and flints, with other cargo being innocent, on her arrival in



the latter part of April, in the year 1823, was permitted to trade with the town of *Vera Cruz*, then in possession of the *Patriots*, on payment of duties to the *Royalist Spaniards*, occupying the castle of *St. John D'Ulloa*, which commanded the entrance of *Vera Cruz*,—that after some time, the said muskets and flints were discovered by the *Royalist Spaniards*, who seized and confiscated the same, but did not interfere with the rest of the said cargo or vessel. And also offered as a witness *Frederick C. Graff*, who proved that the schooner *Harriet*, Captain *Baker*, sailed from *Baltimore*, in March, 1822, with a cargo consisting in part of contraband, bound to *Santa Martha*, and *Carthagena*, both of which places she visited, and sold that part of the cargo not contraband, at *Carthagena*, and then with the proceeds of said sales in money, and the contraband articles, sailed for *Chagres*, and off the port of *Carthagena* was captured by a *Spanish* privateer, who took from her the money and contraband articles, and released the schooner, paying the captain his freight. That afterwards, the navy department ordered captain *Biddle*, of the *United States ship Congress*, to call at *St. Jago*, where the said privateer was owned, and interpose a claim for the said money so illegally taken by said privateer. And further offered evidence, that the general impression of merchants and underwriters in *Baltimore*, at the period when this insurance was made, was, that vessels sailing from the *United States* to ports in *Colombia*, and other ports in *South America*, with cargoes not contraband in whole, or in part, would be permitted to pass and proceed to their respective places of destination without interference, or capture by *Spanish* privateers.

And thereupon the *plaintiffs* offered evidence to show, that the general impression of merchants and underwriters in *Baltimore* was, that vessels sailing from the *United States* to ports in *Colombia*, and other ports in *South America*, with any kind of cargoes, whether contraband or not, were after the proclamation of *Morales* relative to the blockade,

as hereinbefore referred to, captured by *Spanish* privateers, and condemned in the *Spanish* tribunals. And also offered in evidence by *John D. Danels*, that the port of *La Guira*, from the 1st of October, 1822, to the 1st day of January, 1823, was never blockaded in fact, and that during that period the *Colombian* squadron had a decided ascendancy in that neighborhood. And the defendants gave in evidence that the said ship *Budget* was not a remarkably fast sailer, and that the rates of premiums on vessels, proceeding from ports in the *United States*, to ports in the government of *Colombia*, with cargoes of contraband, were from six to seven and a half per cent., but that the vessels so insured were remarkably fast sailing vessels, and were of a class generally named clippers, and built expressly for the purpose of such voyages. And they further gave in evidence that the risk of a contraband cargo carried in such a ship as the *Budget*, from *London* to the ports of *La Guira* and *Porto Cabello*, would be much greater than in these fast sailing *American* vessels, going from ports in the *United States* in similar cases, to the said last mentioned ports. And the defendants further gave in evidence, by several underwriters of great experience, that underwriters, in calculating their premiums on orders of insurance, do not estimate the risk as the worst possible which can arise under such order, and charge accordingly.

And thereupon *the defendants*, by their counsel prayed the court to instruct the jury—

1. That the terms of the order for insurance, and of the policy in this case, amount to a warranty that the ship *Budget* was a neutral ship, bound upon a mercantile voyage, with a permission to carry some articles contraband of war, but in every other respect to be employed and navigated as a neutral ship; and if the jury find, from all the evidence and admissions in the cause, that the ship *Budget*, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian* government at *La Guira*, partly to arm a vessel of

war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La Guira*, for the service of the said government; or that the said ship was to be offered for sale to the *Colombian* government, whenever she might be wanted; or that the said *Meany*, captain of the *Budget*, was to be employed in the naval service of the said government; or that a breach of blockade was committed by the *Budget*, as set forth in the sentence of condemnation of the Prize Court of *Porto Rico*; that then the policy is violated, and the plaintiff is not entitled to recover.

2. That the terms of the said order for insurance amount to a representation, that the *Budget* was a neutral ship, bound upon a mercantile voyage, with permission to carry some articles of contraband of war, but in every other respect to be employed and navigated as a neutral ship; and if they believe from all the evidence and admissions in the case, that the ship *Budget*, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian* government, at *La Guira*, partly to arm a vessel of war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La Guira*, for the service of the said government; or that the said ship *Budget* was to be offered for sale to the *Colombian* government, whenever she might be wanted; or that the said *Meany*, captain of the *Budget*, was to be employed in the naval service of said government; or that a breach of the blockade was committed, as set forth in the sentence of condemnation, that then the policy is discharged, and the plaintiff is not entitled to recover.

3. If the jury believe, that the *Budget*, at the time of presenting the said order for insurance, and at the execution of the policy, was in fact an *American* vessel, owned by *Hugh Thompson*, an *American* citizen, and a merchant resident in the city of *Baltimore*, that the assured were bound so to employ and navigate the said ship, as not to



compromit her neutral character and rights, except so far as they might be compromised by the transportation of some articles contraband of war, for commercial purposes; and if the jury find, from all the evidence and admissions in the cause, that the said ship *Budget*, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian* government at *La Guira*, partly to arm a vessel of war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La Guira*, for the service of the said government; or that the said ship was to be offered for sale to the *Colombian* government whenever she might be wanted; or that the said *Meany*, captain of the said *Budget*, was to be employed in the naval service of the said government; or that a breach of blockade was committed by said *Budget*, and that the existence of such facts, or either of them, became the efficient cause of the condemnation of the ship, and were produced by the act of the assured or their agent, that then the policy is discharged, and the plaintiff is not entitled to recover.

4. If the jury believe, that the ship *Budget* was, at the time of the execution of this policy of insurance, a neutral ship in fact, that it was incumbent on the assured so to employ and navigate the ship, as not to compromit her neutral character and rights, except in the transportation of some articles contraband of war, for commercial purposes; and if the jury find, from all the evidence and admissions in the cause, that the said ship, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian* government at *La Guira*, partly to arm a vessel of war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La Guira*, for the service of said government; or that the said ship *Budget* was to be offered for sale to the *Colombian* government whenever she might be wanted; or that the said *Meany*, captain of the *Budget*, was to be employed in the naval service of said



government, and the existence of such facts, or either of them, became the efficient cause of the condemnation of the ship, and were produced by the assured or their agent, subsequent to the execution of the policy, that then the policy is discharged, and the plaintiff is not entitled to recover.

5. If the jury believe, from all the evidence, that a breach of the blockade was committed by the *Budget*, as set forth in the sentence of condemnation; and that the ship, upon which this insurance was obtained, was an *American* ship, that then the policy is discharged, in as much as a contract of insurance, the object of which was to protect the assured from a loss arising by a breach of blockade, would be void in law.

6. That even if a contract of insurance against a loss from breach of blockade would be valid in law, the assumption of such a risk must arise from an express undertaking on the part of the underwriters, and as there is an entire absence of any such express undertaking in this case, the plaintiff is not entitled to recover, if the jury should be of opinion that a breach of blockade was committed by the *Budget*, as set forth in the decree of condemnation.

7. That the order for insurance in this cause, contains no communication or disclosure of the facts, that the ship *Budget* was, on the voyage insured, to be fully and entirely laden with munitions of war, or that the same were destined for the use of the *Colombian* government, or that the said ship *Budget*, with the said *Meany* as the captain, were to be employed in the service of the *Colombian* navy; that in the absence of all evidence, that the said facts, or either of them, were disclosed to the defendants, at the time the insurance was effected,—if the jury believe that the said facts, or either of them existed—and if they further believe that the said *Meany* was the agent of the plaintiff in chartering the said ship *Budget*, and had the general management and conduct of the employment of the said ship, and that the said *Meany*, at the time this order was presented

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for insurance, and after policy effected, had knowledge of the facts before mentioned, or either of them; and if the jury should further believe, that the facts or either of them, if communicated to the defendants, would have influenced their judgment in forming an estimate of the risk, and have induced them to decline it altogether, or demand a higher premium than what was taken for effecting the policy in this cause, that then the plaintiff is not entitled to recover.

8. That the order for insurance in this cause, contains no communication or disclosure of the facts, that the ship *Budget*, on the voyage insured, was to be fully and entirely laden with munitions of war, or that the same were destined for the use of the *Colombian* government, or that the ship *Budget*, with the said *Meany* as her captain, was to be employed in the service of the *Colombian* navy; that in the absence of all evidence that the said facts, or either of them, were disclosed to the defendants at the time the insurance was effected, if the jury believe that the facts, or either of them existed; and if they further believe that the said *Meany* was the agent of the plaintiff in chartering the ship *Budget*, and had the general management, and conduct in the employment of the said ship, and that at the time when he wrote his letters to the plaintiff, under the date of the 3d and 4th of September, 1822, (extracts from which were communicated to the defendants in their order for insurance,) he had knowledge of the facts before mentioned, or either of them; and if the jury should further believe that the said facts, or either of them, if communicated to the defendants, would have influenced their judgment in forming an estimate of the risk, and have induced them to decline it altogether, or to demand a higher premium than was taken for effecting the policy in this cause, that then the plaintiff is not entitled to recover.

9. If the jury believe, from all the evidence and admissions in the cause, that the ship *Budget*, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian*

government at *La Guira*, partly to arm a vessel of war called the *New Orleans*, belonging to the said government, and in part to establish a depot of arms at *La Guira* for the service of the said government; or that the ship *Budget* was to be offered to the *Colombian* government, whenever she might be wanted; or that the said *Meany*, the captain of the *Budget*, was to be employed in the naval service of the said government; and that such acts or either of them were calculated to produce the condemnation of the ship, upon the event of capture, according to the habits, and common practice of the belligerent in question, that then the policy is avoided upon the principles asserted in the previous prayers, although such acts might not legally authorize a condemnation upon the principles of the law of nations. Which instructions, and each of them, the court refused to give. The defendants excepted.

Upon these prayers ARCHER, Ch. J. delivered the following opinion.

Many very important principles of insurance necessarily arise in this case, and have been very ably and learnedly discussed.

The first question to which our attention will be directed, will be the existence or non-existence of a warranty of neutrality, or of a representation of neutrality.

The order for insurance containing the alleged representation, being referred to in the policy, and by such reference, constituting a part of the policy, whatever obligation it may create, would be considered rather in the light of an express warranty, which would require a strict performance than of a mere representation, which would only demand a substantial compliance with its terms.

It is conceded, that there exists in the order, no direct warranty of neutrality, but it is contended, that if one arises by necessary implication from the words used, an express warranty is created. We admit this doctrine, and shall examine the order to ascertain whether these inferences contended for, are necessarily deducible from it.

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This order demands an insurance against *all risks*, and then merely speaks of a *possible danger of contraband*. The amount of it then, is only this, “I apprehend danger from the peculiar voyage, guard me against every possible risk. I am ignorant of the hazard I run, for my advices are silent on the subject; my fear is, of the possibility of contraband, but you know the nature and course of the trade; as you are to cover all risks, secure yourself by an adequate premium.” There is no assertion that contraband would be on board, the possibility only is asserted. If a vessel be stated to be *American*, there is in general, a warranty that she is *American*, and all the just inferences, and legal consequences which are deducible from such an assertion, flow necessarily; she must be navigated, and documented, as the laws of her nation demand. So, to say, that she sails with a sea letter is a warranty. But it must be observed, that in both these cases there is *the positive averment of a fact*. In this case, there is no such positive averment. That which is stated, is stated *dubiously*. She may *possibly carry contraband*, but whether she will or not, the assured’s advices are silent, or in other words, the they are ignorant of the fact. Can it then be seriously contended, that they meant to warrant as a fact, that which they apprise the office, they know nothing about? Where is the case to be found which decides that the assertion, *she may possibly be an American*, she *may possibly carry a sea letter*, amounts to a warranty? None such have been cited, none such exist; to infer a warranty from such a statement, would be to make a contract for the assured, where they never intended to make one for themselves. The ship being in fact an *American*, and the owners residents and citizens of this place, can make no possible difference, because her national character is not pointed to in the policy by any express designation, and the policy is “*for whom it may concern*.” That is, it is for the plaintiffs, if they are then the owners, or any body else, neutral or belligerent, who might then be the owner, and for whom the



plaintiffs may have been the agents. The expression, "*to be paid to them in case of a loss*," amounts to nothing against this view. For it might have amounted to a mere direction to the office to pay them in the character of agents, if in fact, such agency had existed, in order that in such a case, they might be the more effectually indemnified in the event of loss, for the advance, not only of this premium, but of the balance of other premiums, which may have been advanced as a general agent for effecting insurances, for which advance and balance they would have had an unquestionable lien, as against their principal upon the policy itself. But if these words are interpreted to mean, that the insurance was, at all events, effected for them and them only; *then the words "for whom it concerns"* are contradicted, or they must be treated as if they constituted no part of the stipulation. The rule of interpretation, as we have always understood it to be, is, that you must so construe an instrument, that every word, if possible, shall have its appropriate meaning, and this we do in this instance, without violating or discarding any portion of the instrument. In aid of this view of the clause referred to, we cannot fail to remark the *commercial understanding* of the word contraband, as proved by one of the witnesses, that it was considered rather as having a reference to the kind, and description of the cargo, than the national character of its owner, or of the peaceful or belligerent relation of his government towards other powers. There is then no warranty of neutrality, and considering the representation as incorporated in the policy, and constituting a part of it, there exists of course no representation of neutrality.

This leads us to the inquiry of the extent of the risk covered by this policy. The words of the policy look *per se*, to a promise of indemnity for all losses except those proceeding from illicit or prohibited trade; it covers the risks of neutral ownership, and of belligerent ownership. We mean the ordinary risks of such an ownership, for perhaps there may be some belligerent risks, so extremely ha-

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zardous, imminent and extraordinary, as that they could not be presumed to have entered into the contemplation of the parties, and where of course concealment might be held to vitiate the policy. But in the absence of such uncommon peculiar perils, the assurer shall, in the general phraseology he has used, be presumed to have contemplated the possibility of the greatest risk, and if they have not done so by demanding a premium commensurate with their contract, it is their own fault, and they shall not in a court of justice be permitted to seek shelter under their own neglect, from the fulfilment of their express stipulation. And here we may be permitted to say, that the interpretation of this instrument is a question for our consideration exclusively. The same rules apply to a policy, as to all other instruments. It must be expounded by principles of law, and not by the opinions of witnesses. It is true, that where the usage of trade has assigned meaning to particular words, the courts will resort to such usage to assist them in the interpretation, and to enable them to effectuate the intention of the parties. But the assured cannot escape from a legal responsibility, change, modify or alter it, by seeking refuge in the varying opinions of commercial men, when they expressly say, they assume all risks, and no warranty exists that will justify us in limiting their responsibility. Had *Thompson and Bathurst*, instead of acting for themselves, been agents of the subjects of a belligerent nation, there can be no doubt that the policy covered such belligerent property, and the ordinary risks to which it would have been subjected. It was true she was registered as an *American* ship, but the assurer had no right to look at this without a warranty or representation, for they might before the date of such policy have sold her to such belligerent, or had they been in treaty by their agent in *London* for the sale of this vessel to a belligerent, for whom they had orders in case of a purchase to insure, and *Thompson & Bathurst* not in fact knowing whether, at the date of the order for insurance, a sale had been effected or not, and acting in

pursuance of their agency to cover belligerent ownership, if such should be the fact, or if not, to secure themselves, could there exist a doubt but that the policy would have covered either the belligerent owner, in case of a sale to him, or *Thompson & Bathurst*, if they had not in fact parted with their property?

The doctrine, that in such a policy the risk of belligerent ownership is undertaken, is settled in the Supreme Court of the *United States*. *Hodgson vs. Mar. Ins. Co. of Alexandria*, 5 *Cranch*, 100. And it is conceded, that the *New York* decisions have pronounced the assumption of belligerent risks. Nor do we perceive that any of the *English* decisions contradict in this doctrine; certainly those which have been cited by no means impugn it. It is not our intention minutely to analyze all the authorities cited, but it may be briefly remarked, that the following principles are deducible from the cases of *Christie vs. Secretan*, 8 *T. R.* 192. *Dawson vs. Atty*, 7 *East*. 367, as explained by Lord *Ellenborough*, in *Bell vs. Carstairs*, 14 *East*. 374. *Horneyer vs. Lushington*, 15 *East*. 46. *Oswell vs. Vigne*, 15 *East*. 74. 1. That although all risks are assured, neutral as well as belligerent, yet the vessel insured must not induce her condemnation, by the absence of documents necessary to attest her national character. 2. That the insurance operates upon the ship whether neutral or belligerent, as she may happen to be at the time of insurance. 3. That a general insurance covers all losses from the perils insured against operating *adversely*, and not *through the medium of any act or neglect* on the part of the assured himself, or his agent, producing the loss of the property insured. 4. That for a loss of which the owner or his agent may be the efficient cause, proceeding from his act or neglect, and which in the captain will not amount to barratry; the owner is his own insurer, *and* his loss thus occasioned is not covered by the policy.

Are not these doctrines reasonable and just? What is more reasonable than to say, that although the contract is

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silent on the subject, it should be construed as having reference to, and operating upon the character and condition of the ship, as it existed in fact at the time the policy was effected? All contracts with regard to property, are undoubtedly made in reference to it, as it exists at the time of the contract, and any change in it, altering its character or its quality, would be a breach of good faith. This principle, as it is founded in the soundest morality, will be found to pervade every branch of the law as connected with the doctrine of contracts. If the vessel be neutral, it would be then only in accordance with this universal and obvious principle, to say either, that such her character as it existed in fact, should be maintained, or if forfeited by the act of the assured, he should not make such act the basis of a claim against the insurer. But it may be said, that the highest risk of a belligerent capture is assumed, and so no injury would be done to the insurer. To this however, it may be replied, that this is the chance the insurer takes, that the vessel may in fact be neutral, and if so, he is entitled to all the lessened responsibility growing out of such character. We do not mean to say, as seems to be intimated in the *Massachusetts* case, that it enters into the contract, that if the vessel be neutral, the neutral character shall be maintained; but the doctrine grows out of the soundest principles of equity and justice, as applicable to the state of the thing about which the contract is made, at the time when it is made, not as springing from any stipulations of the contract directly enforcing and coercing their observance, but as having their foundation in that sense of honesty and good faith, which the law declares shall regulate all the social transactions of man, which are the objects of its cognizance. With what pretence of equity or justice could the assured call upon the underwriter for indemnity, when his own default, or that of his agents, had occasioned the loss of the subject insured? We do not speak of such conduct on the part of the captain as may be barratrous, for that is expressly assumed, but of the other



acts and defaults of the captain not amounting to barratry.) The most labored train of reasoning could not make the proposition clearer, than the statement of the interrogatory itself, which must receive its response in that sense of justice, inherent in the breasts of all mankind. A policy against all risks will not cover the frauds of the owner, *Groix vs. Knox*, 1 *John. Ca.* 340; nor his misconduct, nor his voluntary acts inducing loss; for it is impossible to presume that these risks entered into the contemplation of the parties, and if they did, would it not be manifestly against the policy of the law to support them? Mr. *Philips* condemns the validity of a policy bottomed upon such principles, and subjects to the same fate, an insurance against the party's own negligence, as it would place one man completely in the power of another, and would be injurious to the parties, and to the community of which the assured and insurer were members. Mr. *Justice Kent* says, in the case above referred to, that "insurers are not liable for losses arising from even *the mistakes* of the owner or captain." And why should they be? The captain and mariners are the agents of the owner in the navigation of the ship, and in virtue of the existence of such agency, he is answerable for their conduct in this respect, and is his own insurer for losses proceeding from such conduct. This doctrine is not confined, as has been contended, to such acts as leave the ship without the necessary documents, to attest her national, or neutral character, but to *other acts*, inducing a loss. If a vessel be partly laden with powder, and she is blown up by the negligence of one of the mariners, the underwriters are not answerable. So it has been held, that if a captain of a neutral vessel resist a search, when it is rightfully demanded by belligerents, or attempt to rescue a vessel sent in by a belligerent captor, the loss cannot be recovered of the underwriter. So in the cases of *Horney* and *Lushington*, and *Oswell* and *Vigne*, the having on board simulated papers was the act of the captain, not affecting the character of the ship; for that was admitted, in

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the sentence of condemnation, to be *Russian* in the one case, and *Swedish* in the other. In short, in all policies, general or special, the assured always undertake for the faults and negligence of their own captain, or for his unskillfulness, and he cannot be heard to ask in a court of justice for indemnity for losses proceeding from such causes, the risk of which the underwriters never undertook.

We cannot accede to the doctrine, that the cases in *East*, proceeded upon the ground of the unseaworthiness of the vessel. It is a conclusive answer to this argument, to say, that had this been the foundation of their judgment, the decision in *Dawson & Atty*, would have been different from what it was. For if the absence of a ship's necessary document made her unseaworthy, the owner of the goods insured could not in that case have recovered. For his contract would have been infected by the condition of the ship, although he were not owner.—Being unseaworthy the policy would have been discharged. Besides, if these various cases could have been put upon this ground, it is inconceivable that *Ld. Ellenborough* should have so labored to place them upon other grounds. Had the implied warranty of seaworthiness any thing to do with the determination in *Bell and Carstairs*, the possession of all documents to show national character, would have been held, to be necessary at the commencement of the voyage; this implied warranty always operating at that moment; yet his lordship declares, that the possession of such documents are only necessary in case of capture, or when their production becomes material; the want of them at any other time, or for any other purpose, is immaterial, and the want of them is immaterial even in the case of capture and condemnation, unless the absence of such paper is the efficient cause of condemnation. We may in fine, observe, that we discover in these cases, the development of no new or extraordinary doctrines, but the application of the first, elementary and best established principles of the law of insurance to the cases then before the court.

We shall now consider the vessel in two lights. 1. Either as a belligerent transport, or, if not in that character, as having a death wound inflicted on her neutrality, by the trade in which she had embarked *before the policy began to operate*.

2. As a neutral vessel insured against all risks which underwriters in a general policy assume, except prohibited trade; but that the acts complained of as changing her character into a belligerent, took place after the policy began to operate, and that the condemnation proceeded upon that ground.

Taking either view, it will be found, as we conceive, that the cause of condemnation is covered by the terms of the policy, and the risks assumed.

In the consideration of the first question, we shall not stop to inquire, whether she were in fact a belligerent vessel, and had lost her neutral character, at the date of the policy, but shall assume the truth of the proposition for the sake of this inquiry. It may, however, be observed, that the policy began to operate but the very day before her departure from *London*, and whatever hostile footsteps, if any, were impressed upon her, were made before the date of her policy. The charter party had been made nearly a month before her cargo was on board; and it is fair to presume, that all documents and papers which were found on board at the time of the capture, were with her when the policy began to operate. The fact of her neutral ownership, and her being documented as a neutral, could not affect the question; for if she were, in fact, in the service of one of the hostile powers, all the world, notwithstanding her ownership and documents, would have considered and treated her as a belligerent vessel.

Assuming then the truth of the proposition, that she was a belligerent vessel at the date of the policy, let us recur to some of the results which we have endeavored to establish. We have seen,

1. That a general policy covers belligerent risks.

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2. That the policy operates upon the character of the ship at the time of insurance, and as a corollary from this, 3dly. That a change effected in the character of the object insured, and operating as the efficient cause of condemnation, must be made after the inception of the contract of insurance, to have the effect of discharging it.

If we have succeeded in maintaining these positions, the conclusion inevitably follows, that the vessel being belligerent when the policy was effected, it operated upon its character as it then existed, and if her hostile attitude and character be construed to be the ground of condemnation, then the loss is within the policy.

The second general inquiry we propose making, assumes the fact, that this vessel was neutral when the policy was effected. She is admitted to be neutral, and to have been documented as an *American* ship, but, independent of these admissions, it assumes the further fact, that the acts complained of, as effecting a change in her from a neutral to a belligerent, were done after the date of the policy, and this presents three inquiries for consideration.

1. Was such change, if any, produced by the act or default of the captain or owner.

2. Was such act or default the efficient cause of condemnation, and

3. Was such cause of condemnation uncovered by the policy.

Having regard to the above assumption, and supposing that the acts done converted her into a belligerent; if these inquiries are answered in the affirmative, then the policy is discharged, if there be any truth in the reasoning and views taken by us in the former part of this opinion.

It appears that the cargo belonged to residents of *London*, and was consigned to a commercial house in *Caracas*, with an ultimate destination for the *Colombian* service. It is by no means certain from the sentence, whether Capt. *Meany* knew of the ultimate destination of this cargo. It is not believed, that any of the ship's papers, if made in the ordina-



ry form, would show more than the character of the goods, and the name of the consignees. But the destination of the cargo, in all probability, was fixed and ascertained by the shipper's letters of advice to the consignees, or by the communications of Mr. *Zea*, if there were any on board, or if there were not, his intentions with regard to this property might have been intimated in the shipper's letters to the consignees, or if not there ascertained, was found to exist in other documents or communications on board the vessel, or were proved by the declarations of Capt. *Meany*. But his knowledge is entirely immaterial. If he did know it, he must be considered as an actor in these transactions; and if he did not know, it was owing to *his default*, that letters of advice, or any other document, or papers were taken on board which would jeopard the neutrality of his vessel, and subject her to forfeiture and confiscation. He had a right to guard himself against the reception on board of every document, letter, or paper, which could tinge his property with a belligerent stain, and having the right, it was his duty to do so, and being his duty, it was his default in having them there. So, that viewing the case in any light, if these transactions converted the vessel from a neutral into a belligerent, the act, or the default of the captain was the *efficient cause of condemnation*.

We have said, that the act or default of the master was the efficient cause of condemnation; this general expression however, we desire should be taken with this qualification, that the sentence proceeded upon the ground that the ship was by such act or default converted into a belligerent transport, or lost her character as a neutral; if this be not the fair interpretation of it, but it did actually proceed upon the ground of contraband, it would be a risk, expressly covered, and all the acts and proceedings of the master in relation to the shipment, &c. so far from being any default on his part, would have been proceedings in furtherance of the objects of a legitimate neutral voyage, and covered by the stipulations of the parties. The contraband

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character of the shipment being in that case the efficient cause of condemnation, and not any act or default of the master, changing the character of the thing insured.

And here we are led to the inquiry, what was this ground of condemnation? and particularly its nature and character, as effecting the matter in controversy between the parties to this suit?

Before we proceed to an examination of the facts averred in the sentence, it may be well to fix certain principles in order to enable us to arrive at proper conclusions from the facts.

The policy of the nation is especially that of a neutral. It is dictated by the habits of our people, the character of our institutions, and our remote and local condition. Whatever discrepancy, therefore, there may exist among the writers upon inter-national law, upon the subject of the lawfulness of a contraband trade, it should be the duty of courts of justice, looking to this essential policy of the nation, to maintain such doctrines as would be calculated to extend our trade, not to limit and restrain it, provided such doctrines can be supported by writers of acknowledged authority. *Vattel*, 402. Although he admits the right of belligerents to confiscate contraband goods, he seems as implicitly to admit, the right of a neutral nation to trade in all articles in time of war, which she could in time of peace. He says, the nation at war does not oppose the right of the neutral. It only exercises its own right of confiscation, and if the rights clash with, and reciprocally injure each other, it flows from the effect of an inevitable necessity: That it is a collision which happens every day in war. *Azumi* altogether denies the right of confiscation, except where the commerce in contraband is carried to places under the dominion and control of the enemy of the nation with whom she trades, unless permitted by some conventional law. But conceding the right of confiscation, derived from the tacit consent of nations, the right and lawfulness of trade in contraband is not impaired. Acting in conformity with these

views, the courts of *Massachussetts* and *New York* have declared the lawfulness of contraband shipments, and of course, that the risk of such shipments may be rightfully undertaken by the underwriter. Following up this principle, and conceding that a neutral, having nothing to do with the war, should be at liberty to exercise his accustomed trade in time of war, which he enjoyed in peace, would it not follow that the neutral had a right to ship contraband, with a view to a sale to one of the belligerents, in the same manner that he enjoyed that right in time of peace, and as he unquestionably enjoys it, where sales are in contemplation to the private subjects of such belligerent? No reason exists in the one case, for a condemnation of the shipment, more than in the other. The neutral shipper cannot be presumed to have imbibed a partiality for one of the nations at war, in the one case more than in the other, for both must be considered as undertaken for purposes of gain merely. And what is there in the different destination of such a cargo, that could mark one as contraband merely, and the other as hostile? Nothing surely, for in each case the shipper must know that his cannon and other munitions of war will be hostilely employed. In the one case, it is true, the government procures them directly, and in the other, indirectly, but his strength consists as much in the material of war in the hands of his subjects, as if he had them in his own military store houses. There is no principle growing out of the necessity of a belligerent, or his safety as a nation, which would lead us to denounce as hostile and unlawful, the cargo in the one case, more than in the other. They are in truth, both merely contraband shipments, and as neutral property, liable to capture and condemnation.

But let us suppose, that, in virtue of the consignment, the property, by delivery, became the property of the consignees, then domiciled in a belligerent country, and that they were, therefore, by the laws of war, considered liable to capture and confiscation as enemy's property. This could



only affect the cargo, and could not endanger the ship ; for a neutral ship may lawfully carry belligerent property.

As far as the sentence regards the shipment, whether that shipment be considered as contraband, and the property of the neutral shipper, or as the consignee's property, and therefore enemy's property liable to capture and confiscation, the case presents no difficulties; for, in either point of view, the cargo was within the terms of the policy, and covered by it, both the one and the other being a lawful trade, and such as a neutral might rightfully embark in.

This shipment must be considered in the one light or the other. It cannot be viewed as government property, for the sentence avers the fact, that it was at the time of sailing the private property of the shippers, and it is not perceived, whatever may have been the ultimate view with regard to the cargo, how, during the voyage, it could have been divested from the shippers. The consignees had no control over it, until the delivery of the cargo, or of the bills of lading, and neither of course had taken place. So that it was, in fact, private property, and admitted to be private neutral property at the time of sailing. But let us see the object and purpose of the shipment. It seems to have had an alternative destination, dependent on the contingency of the existence of a blockade of the port of *La Guira*. If that port was not blockaded, it was to be delivered to the consignees, in order that certain intentions of Mr. Zea, the agent of *Colombia*, resident in *London*, might be carried into effect, in putting the squadron on a more respectable footing; that a brig of war might be armed, and that a depot of munitions might be established at *La Guira* for the public service. Now, however strong this language may be, as indicating a shipment in fact for the *Colombian* government, it seems to be negatived by two considerations, which demonstrate a shipment in the first place, merely with a view to a sale to government; and in the second place, with a view to a general sale for the benefit of the owners, or in other words a mere commercial voyage, undertaken for



commercial gain by private property holders. The property is averred, at the time of sailing, to be in the shippers; and if the port of *La Guira* was blockaded, the master had directions to bear away for *Santa Martha*, where the consignees were to dispose of the cargo at discretion, which terms, in their ordinary acceptation, would mean a sale of the cargo to the best advantage for the owners, without regard to the public or private character of the purchaser. These considerations negative a sale to the government of this property, and the whole sentence only goes to show, that the shippers had a prospect, derived from the communications of Mr. *Zea*, of a sale to government, if the vessel could reach *La Guira*; and if it should be blockaded, their consignees must dispose of it to whomsoever they could, to the best advantage for the shippers.

But let us suppose, that the cargo was shipped under a contract to become the property of the government of *Colombia* on delivery, and to be there paid for; and this is the most favorable light for the underwriters in which the ground assigned by the court can be viewed, as it declares, that at the time of sailing, the shipment was the property of the shippers, which it could not have been if the government had given an order for the cargo, and it had been delivered to the master, for in such a case the title to the property would have vested in the government considering it as the consignee. Then the cargo is neutrally owned, and is not belligerent. We are aware that the Prize Courts have determined that capture is equivalent to delivery, and that in consequence of it, the cargo would be confiscated as belligerent. But its neutral character is maintained up to the moment of capture, and the character of the cargo would be changed by no act over which the neutral owner could have any control, but by the technical principle of the laws of war, which substitutes in such case, the captor for the consignee, in order the more effectually to guard against the frauds of belligerent shipments, under the dress and appearance of neutral ownership. How far such a

shipment, thus consigned, after capture and condemnation, might falsify a warranty of neutrality, it is unnecessary to determine. It is sufficient here to say, that there is no warranty of neutrality, and a shipment of belligerent property, admitting it to be such, may be lawfully made by a neutral in the absence of any warranty or representation. But could it be seriously contended, that the principle above adverted to, could convert the neutral vessel into a belligerent transport? The vessel is transporting the property of neutrals, and is in their service, not in that of the government. She would seem to have no attribute of a hostile transport. If, by fiction of law, the property, from the moment of capture, is considered as delivered, it would seem to be a singular extension of that principle to say, that by capture, the character of the vehicle is utterly changed from a neutral, commercial vessel, into a belligerent transport, when by the capture, the vessel is considered as having terminated her voyage and delivered her cargo. If the delivery of her cargo to the enemy constituted her a transport, it might with the same propriety be maintained, that if this vessel had delivered her cargo at *La Guira*, and was on her return voyage, in ballast, or with an innocent cargo, that she was liable to condemnation as a belligerent transport. In such a case the position could not be maintained, nor can it be in the actual predicament of this ship, as disclosed by the sentence.

Thus much with respect to the cargo. Any or all of these considerations existing, would have rendered it liable to capture and condemnation, either as contraband or as enemy's property, but by the laws of war would not have affected the vessel. Indeed, if any of the circumstances attending this shipment could be considered as of so malignant and aggravating a character, as to have affected the vessel in the judicial eye of a Prize Court, and to have justly subjected her to forfeiture, still, these proceedings, and this trade, being all such as *a neutral might lawfully engage in*, must be supposed to have been contemplated by the

underwriter, is within the risk assumed, and he must be answerable.

The consideration of the transport character of the vessel must spring from the service in which she is engaged. Sir *William Scott* in the case of the *Friendship* says, that the hiring of a vessel by the agents of the belligerent, for the purpose of carrying stores in her service, constitutes her a transport. By this, he means, (and we collect his meaning as well from his words as the facts of the case he decides,) that such vessel is only a transport, if she carry the property of the government, and that in such a case she is equally a transport, as she would be if she carried a detachment of troops. There can be no doubt of the truth of this principle, but the considerations before urged go to show, that this vessel was in the pursuance of an ordinary, neutral, and commercial voyage, *neither hired by the government, nor in her service, but in the service of private individuals*, and there exists of course no foundation for considering her as a belligerent transport.

We have stated that it was clearly inferable from the sentence, that the shipment in the first instance was made with a view to a sale to the government by the consignees, and no doubt their instructions, in case of the vessel's reaching *La Guira*, were to that effect. But this design could not make her a transport. She must, to give her that character, *be employed to carry goods belonging to the belligerent. But "she was offered, in case she should be needed, to the Colombian government."* Now, suppose the vessel completely equipped for war, and built in a neutral State, whose laws did not forbid it, with intent to sell her to one of the belligerents, and she sails in pursuance of that intent, she would be only a contraband article, and such as might be lawfully transported by a neutral citizen, subject only to the conflicting right of *seizure in transitu*, and of *confiscation*, and such being the right of the neutral owner, the underwriter must look to the possibility of the existence of such an intent. He knows her destination is to a belliger-



ent port: He knows the structure of the vessel, and is bound to know the course of the trade, and all the incidents and dangers to which the vessel as a neutral may be subjected; clothing this part of the case in the worst possible garb for the assured, the underwriter would be responsible. This vessel was an ordinary ship, pursuing the usual avocations of commerce, with none of those dangerous characteristics which distinguish the vessel in *Robinson's* reports. It is true, like all other vessels engaged in that trade, she was originally built with some adaptation to warfare, but, from the time of her first structure, she had been employed in commercial voyages. She had not the distinctive marks of warlike offence which the *Brutus* had, but her predominant character was commercial; so that conceding that case to be law, this would not fall within its range.—But here, it is true she was to be contingently offered to the government, and considering her as an article *ancipitis usūs*, it might be proper to look to her contingent destination, as determining her character to be contraband. Considering then, the fact of her being offered to the government, as converting the ship into a contraband, still a neutral owner may lawfully transport his ship with a view to a sale, and there would be no forfeiture of even a warranty of neutrality by the existence of such an intent, accompanied by a sailing in pursuance thereof.

So far then, as this ground of condemnation is concerned, whether we consider that condemnation as lawless, except as regards the goods, or as justified by the aggravating circumstances attending the shipment, or upon the ground that the vessel herself was contraband, (and in any other light, we have endeavored to show it cannot be viewed,) the assured, by it, are not prevented from recovery, even although these various acts were done after the inception of the risk. For although they might have been the efficient cause of the condemnation of the vessel, we cannot consider them as flowing from the fault or default of the



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owner of the vessel, or her captain, as they were all justifiable in the rightful pursuit of a lawful neutral voyage, and were of course, within the risks assumed.

The next cause of condemnation must be passed in review. The attempt of this vessel to break a blockade of the port of *La Guira*.

The principles applicable to this subject, it has been adjudged by the Supreme Court of *Pennsylvania*, 1 *Bin.* 293, and by the Supreme Court of the *United States*, 4 *Cranch*. 186, are correctly ascertained by the *British* treaty of 1794, and that it is, in exact conformity with the law of nations. Without mounting to a more distant source, we shall look to these cases, and to this treaty, as furnishing the law on the subject.

There must be notice to neutrals of the existence of a blockade. When the *Budget* sailed from *London*, it is clear from the sentence, that she did not know of the existence of a blockade, for she had orders, if there existed a blockade, to bear away for *Santa Martha*. This too, manifests the absence of a *sailing with intent to violate a blockade*. If *without notice she attempted* to enter, it was the duty of the blockading squadron *to have turned her away*. *The attempt, then, to enter without notice is not an offence*, but the offence which subjects to confiscation, is the *attempt to enter with notice, or after being turned away, again attempting to enter*.

Now the sentence is *prima facie* evidence of what it states, and all inferences which a rational mind can draw from such a statement, may legally and properly be deduced to uphold and sustain the legality of the ground. It states *an attempt to enter a blockaded port merely, unaccompanied with any assertion of notice, either actual or constructive*. It is then *prima facie* evidence of an attempt to enter a blockaded port, but *not of notice, not of a turning away*. This you *cannot* infer. We infer one fact from the proof of the existence of another fact, because the fact inferred, usually attends the fact proved. This princi-

ple is at the bottom of all the doctrine of inference and presumption. Now, the attempt to enter a besieged town regularly invested after notice, is an extraordinary occurrence, and the usual attendant of such attempts, instead of *notice*, is a *want of notice*. There is then, no ground of inference, no room for deduction; but looking at the instructions of the captain to bear away in case of a blockade, and accompany them, with the consideration of the notices usually governing men, and their customary conduct, the inference is directly and palpably the other way, that there did exist no actual notice—constructive notice there clearly was none. There is, then, nothing to leave to the jury upon this subject, and this furnishes no ground of condemnation. But if notice cannot be inferred from the ground condemnation, can you infer it from the *sentence of condemnation itself*? You may support the sentence by referring to the grounds of it, but we should doubt whether the reverse of the proposition is true. *The reasons must speak for themselves*. These show on the part of the assured, only an innocent act, because there is no notice. But suppose it for a moment to be ambiguous, no court has heretofore, that we are aware of, resorted to the sentence to explain the ambiguity, and to support and maintain the reasons; but in such case, they look into the proceedings, and the facts therein detailed and proven, to dissipate the doubt. Would we be bound to comity to foreign tribunals to infer a legal condemnation from an ambiguous ground? Would it not be an overstrained comity, looking to the actual practices of the prize tribunals of the *European* nations for the last forty years? Are we, in the face of the fact, that *Spain* has acknowledged that our property to the amount, at all events, of five millions of dollars, has been illegally condemned and confiscated, to proffer on our part this comity? With all these facts before us, with the remonstrances of our citizens for the last thirty years, against the violations of our neutral commerce on the part of nearly every maritime nation of *Europe*, (and which are now mat-

ters of history, having formed the basis of many negotiations,) if the mind would have an inclination, where there existed an ambiguity, it would be rather against the evidence than in favor of it.

It follows from the preceding views, that the prayers offered by the defendants' counsel must be rejected.

*Plaintiff's Exceptions.* 1. The defendants, to support the issue on their part, offered evidence to the jury, that the ship *Budget*, on which the policy in this cause was effected, at a sale made in pursuance of the condemnation of said ship at *Porto Rico*, was purchased by *John Meany*, her former captain, as the agent, and for the account of *Hugh Thompson*, in whom the interest in said ship, and her freight in this cause is averred; and also offered in evidence, that after the return of said ship to *Baltimore* from *Porto Rico*, she came into possession of *Thompson*, as owner thereof, and that he exercised acts of ownership in relation to said ship, and fitted her out, and despatched her on a foreign voyage, and was considered the owner of said vessel. Whereupon the plaintiff offered evidence to prove, that the said ship, at the sale under the condemnation at *Porto Rico* aforesaid, was purchased by said *Meany*, on his sole account, and not as the agent, or for the account of said *Thompson*, and that after the return of said ship to *Baltimore* from *Porto Rico* aforesaid, she was continually in the possession of said *Meany* as his property, and that he exercised acts of ownership in relation to said ship, and that the said *Thompson* never meddled with said ship, after her return, but as the agent of said *Meany*. And thereupon the defendants, by their counsel, prayed the opinion of the court to the jury, that if they should find from the evidence, that at the sale made by virtue of the decree of condemnation of the Prize Court at *Porto Rico*, in evidence in this cause, *John Meany*, who was the captain of said ship at the time of her capture, became the purchaser of said ship or the account of *Hugh Thompson*, and that said *Thomp-*



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son affirmed and adopted the said purchase, as so made on his account, that the plaintiff is not entitled to recover in this action, as for a total loss on said ship; which opinion the court (HANSON, A. J.) gave, and so directed the jury. The plaintiff excepted.

2.—1. Upon the whole evidence stated in the preceding exceptions of the plaintiff and defendants, which is to be considered as a part of this, the plaintiff, by his counsel prayed the opinion and direction of the court to the jury, that if the jury find from the evidence, that after the condemnation of said vessel, captain *Meany*, at the sale at *Porto Rico*, made under said condemnation, became the purchaser of the said vessel, on account of the said *Thompson*, without any authority from the said *Hugh Thompson*, except what may be held to be incident to his office as captain of said ship, and that the said *Hugh Thompson* afterwards ratified and adopted the purchase of said *Meany*, and took possession of said vessel as his own, yet, that such purchase and adoption did not convert the total loss into a partial one, and does not bar the plaintiff from recovering in this cause as for a total loss of the said vessel. 2d. That the underwriters, if they can avail themselves in any way of such purchase and confirmation, can only claim as salvage, the difference between the actual value of the ship, at the time of the sale, and the sum paid for her by Capt. *Meany*. Which directions, and each of them, the court (HANSON, A. J.) refused to give. The plaintiff excepted.

It is agreed in this cause, that it shall go up, on the exceptions as agreed upon, on the part of both plaintiff and defendants, that in the event of the Court of Appeals deciding the plaintiff to be entitled to a total loss, then the verdict shall be amended, and entered for a total loss; but if the Court of Appeals should decide that the loss is an average, and not a total loss, then the verdict shall be amended, and entered for such sum as two persons, one chosen by each party, shall determine, &c.



The verdict and judgment were for the plaintiff, and an appeal was prayed by both parties to the Court of Appeals.

The causes were argued before EARLE, MARTIN, STEPHEN, and DORSEY, J.

*R. B. Magruder, Purviance, Meredith, Martin and Wirt*, for the underwriters, in their appeals, contended,

1. That the record, or copy of the record of the Prize Court of *Porto Rico*, which was rejected as evidence by the court below, was fit and proper evidence for the purpose of showing, that the original papers, of which copies and translations purport to be inserted in said record, were in the ship *Budget* at the time of her capture, and were acknowledged to have been so on board by the master of said ship, in his examination upon oath before the said Prize Court, and that the said record ought to have been received in evidence for that purpose, by the court below.

2. The court below erred in admitting *John D. Daniels* as a witness, for the purpose, and under the circumstances set forth in the defendant's third exception. *Bell, et al. vs. Carstairs*, 14 *East*. 392. *Bolton vs. Gladstone*, 5 *East*. 155. 1 *Marsh. Ins.* 428, 572, 435, note. *Donaldson vs. Thompson*, 1 *Camp. N. P.* 429. The act of 1813, ch. 164. 1 *Phil. Ev.* 232. 1 *Stark. Ev.* 147. *Cooper vs. Smith*, 15 *East*. 103. *Lothian, et al. vs. Henderson, et al.* 3 *Bos. and Pul.* 544.

3. The terms of the order for insurance, and of the policy, in this case, amount to a warranty, that the ship *Budget* was a neutral ship, bound upon a mercantile voyage, with a permission to carry some articles contraband of war, but in every other respect, to be employed, and navigated as a neutral ship. 1 *Marsh. Ins.* 350. *Routledge vs. Burrell*, 1 *Hen. Black.* 254. *Ib.* 257. *Worsley vs. Wood*, 6 *Term. Rep.* 710. *Ib.* 720. And the court, and not the jury, is to expound the contract. *Ferris vs. Walsh*, 5 *Har. and Johns.* 308. *Horneyer vs. Lushington*, 15

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*East*. 51. *Worsley vs. Wood*, 6 *Term. Rep.* 718. No precise form of words is necessary to constitute a warranty, which may be implied by the court. *Goix vs. Low*, 1 *Johns. Cas.* 343. *Ib.* 341. *Duff vs. Lawrence*, 2 *Ib.* 170. *Philips on Ins.* 135. Such an implication may be made from the assertion, that the vessel was owned by an *American* citizen. *Stocker vs. Merrimack Co.* 6 *Mass. Rep.* 220. *Kimble vs. Rhineland*, 3 *Johns. Cas.* 130. And such an inference was fairly deducible from the declaration, that *contraband* might be on board,—as *contraband*, can only be predicated of a neutral ship. *The Commercen*, 1 *Wheat. Rep.* 390. If there was a warranty, a literal, and not a mere substantial compliance was necessary. *De Hahn vs. Hartley*, 1 *Term. Rep.* 343. *Bean vs. Stupart*, *Doug.* 11.

4. If the terms of the order did not amount to a warranty, they did to a *representation* of the neutrality of the ship, and if it was untrue, the policy was discharged. 1 *Marsh. on Ins.* 450. *Phillips on Ins.* 82. *Goold vs. Shaw*, 1 *Johns. Cas.* 302.

5. The *Budget* being at the time of presenting the order for insurance, and at the date of the execution of the policy, an *American* vessel, owned by an *American* citizen, and merchant, resident in the city of *Baltimore*; or being a neutral ship in fact, and having sailed on the voyage insured, entirely laden with munitions of war, which were destined for the service of the *Colombian* government, and being in fact, destined to become herself a member of the *Colombian* squadron; and *Meany*, the captain, being destined to be employed in the naval service of said government, and a breach of blockade having been committed by said ship, compromised her character, as an *American*, or neutral ship, or as a merchant ship, and by the commission of the said acts, or any of them, became a belligerent transport, or forfeited the character under which she was bound, according to the contract of insurance to sail, and conduct herself during the voyage, and so avoided the policy. The

sentence of condemnation is evidence of the facts upon which it was grounded. *Marshall vs. Parker*, 2 *Camp*. 69. 1 *Marsh. Ins.* 392, 424. 4 *Cranch*. 494. 6 *Taunt*. 375. *Everth vs. Hannam*, 1 *Serg. and Low*. 415. If in point of fact, the vessel has become the property of a belligerent owner, the words, "for whom it may concern," would not cover her. 3 *Taunt*. 285, 298. *Bell, et al. vs. Carstairs*, 14 *East*. 391. *Ib.* 393. *Oswell vs. Vigne*, 15 *East*. 70. *Ib.* 72. *Ib.* 74. *Ib.* 76. *Horneyer vs. Lushington*, *Ib.* 46. *Ib.* 49. *Stocker vs. Merrimack Co.* 6 *Mass. Rep.* 228, 229. *Goix vs. Low*, 1 *Johns. Cas.* 343. *Suckley vs. Delafield*, 2 *Caine's Ca. in Err.* 221. *Seamans vs. Loring, et al.* 1 *Mason* 141. *Phillips*, 113, 119. They referred also, in support of this point, to *The Orozimbo*, 6 *Robins.* 430. *The Commercen*, 1 *Wheat.* 382. *The Richmond*, 5 *Robins.* 290. *The Brutus*, *Ib.* 270. *Phillips*, 120. *Marine Ins. Co. vs. Woods*, 6 *Cranch.* 45.

6. A contract of insurance upon an *American* ship, the object of which contract was to protect the assured from a loss arising by a breach of blockade, would be void in law. *Taylor vs. Sumner*, 4 *Mass. Rep.* 58. *Seton & Co. vs. Low*, 1 *Johns. Cas.* 5. 1 *Marsh.* 181, 55, 56. *Phillips*, 35. *Evans' Essays*, 52. *The Vigilantia*, 1 *Robins.* 13. *The Flad Oyen*, *Ib.* 144. *The Henrick and Maria*, *Ib.* 146. 2 *Brown, Ad. Law*, 314. *Vattel*, 501.

7. If, however, such a contract of insurance would be valid according to the law of nations, there must be an *express* undertaking, to that effect, on the part of the underwriters. It cannot be implied. *Miller on Ins.* 136, 144, 179, 188. *Luckley vs. Delafield*, 2 *Caine's Cas.* 221.

8. The concealment, or failure on the part of the assured, to communicate to the underwriters, the facts set forth in the seventh and eighth prayers of the defendants, was a concealment of circumstances material to the risk, if the jury believed the facts set forth, and vitiated the policy in this case. 2 *Marsh.* 461. *Kohne vs. Ins. Co. of N. A.*, 1 *Wash. C. C. Rep.* 93. *Ib.* 123. *Ib.* 158. *Coxe Dig.* 386.

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It is no answer to say, that the plaintiffs had no knowledge of these circumstances themselves. They are responsible for the knowledge of *Meany*, and are to be dealt with, as though every circumstance known to him, had been known to them. *Hughes on Ins.* 350, 354. *Fitzherbert vs. Mather*, 1 *Dur. and East.* 12. *Gladston vs. King*, 1 *Maul. and Selw.* 35. *Gen. Int. Ins. Co. vs. Ruggles*, 12 *Wheat.* 409. 1 *Marsh.* 307, 481. 1 *Park.* 287, 319. *Carter vs. Boehm*, 3 *Burr. Rep.* 1905, 1909. 4 *Dows. Par. Cas.* 97. The risk was essentially increased in consequence of the cargo being wholly contraband, there being a wide difference between such a cargo, and a miscellaneous cargo having some contraband. In the one case, the entire freight and expenses are forfeited; in the other, only on the contraband articles. *The Nancy*, 3 *Rob.* 91. Besides, from the representations of the assured, there was a strong probability that the cargo would be entirely innocent. *Carter vs. Boehm*, 3 *Burr. Rep.* 1915. *Dows. Rep.* 97. It was presenting an alternative risk, when at the time, the assured knew there was no such alternative. That an insurance against all risks, and for whom it may concern, without any qualification, and standing alone, covers all risks, is admitted; but these terms may be controlled, not only by other parts of the policy, but by the order, or representation of the assured. *Urquhart vs. Barnard*, 1 *Taunt.* 450. *Macdonell vs. Fraser*, *Doug.* 260. *Neilson vs. D'Lacour*, 2 *Esp. Rep.* 619. *Buck & Hedrick vs. Chesapeake Ins. Co.* 1 *Peters*, 151. *Campbell et al. vs. Innes*, 4 *Barn. and Ald.* 422.

9. The failure to communicate to the underwriters, the facts set forth in these prayers; and the manner in which the assured did communicate other facts, amounted to a misrepresentation on their part, of facts material to the risk, and vitiated the policy. Considering the assured as having all the knowledge that *Meany* had, (and they are bound by it, whether actually known to them or not;) the question is, were they not guilty of a misrepresentation where they



said, there *might possibly* be some contraband articles on board, when they knew that she was not only to be entirely loaded with such articles, but that both ship and cargo were destined for the service of the *Colombian* government? According to the true state of the facts, the voyage was peculiarly perilous; when the information communicated to the underwriters was calculated to produce a belief, that the risk was an ordinary commercial risk, enhanced by a small quantity contraband articles. Independent of the forfeiture of the cargo, consequent upon a capture, under such circumstances, its destination to the agents of a belligerent government involved the forfeiture of the ship also, she being converted by such employment into a belligerent transport. *The Commercen*, 1 *Wheat*. 391, 392, 393. *The Friendship*, 6 *Robinson*, 425. *The Orozimbo*, *Ib.* 430.

The first exception of defendant's was abandoned.

Upon the plaintiff's exceptions, they argued, that the contract of insurance is a contract of *indemnity* merely, and that any act of the assured, after the vessel returns to this country, manifesting an intention to adopt the act of recovery as his own, is for the benefit of the underwriters, and converts a total, into a partial loss. 1 *Caine's Ca.* 296. *note*, *Ib.* 41, 42.

Up to the period of abandonment, the captain is the agent of the owner; subsequently, he is the agent of the underwriter. *Phillips*, 468. If subsequent to the abandonment, the assured purchase the property, he waives the abandonment and cannot recover for a total loss. *Ogden vs. the Fire Ins. Co.* 10 *Johns. Rep.* 179. *Ogden vs. the Fire Ins. Co.* 12 *Johns. Rep.* 31. After condemnation, a purchase by an agent, is for the benefit of the assured, or the underwriter, and not for that of the agent. *Oliver et al. vs. Newburyport Ins. Co.* 3 *Mass. Rep.* 64. *Unit. Ins. Co. vs. Robinson*, 2 *Caine's Cas.* 280. *Robinson & Hartshorne vs. Unit. Ins. Co.* 1 *Johns.* 592.

*Taney*, (Att'y Gen. U. S.) *Johnson, and Glenn*, for the assured.

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*Second Exception.* As to admissibility of the record of condemnation, for the purpose for which it was offered.—Judgments in courts of admiralty in this respect, stand upon the same footing as domestic judgments, and though the latter are binding between the parties, and privies, the *evidence* upon which they are founded, is not admissible, in subsequent controversies, even between such parties.—*Karthaus vs. Owens*, 2 *Gill and Johns*. 445.

The only exceptions to the rule, are, when the witness, whose evidence is desired, is dead, then his very words must be proved; or when the fact to be proved, is in relation to pedigree. *Chirac vs. Reinicker*, 2 *Peters*, 613.—Upon the question of prize, or not, the judgments of courts of admiralty are binding upon all the world. *Croudson et al. vs. Leonard*, 4 *Cranch*. 436. Considering the judgments of courts of admiralty, in reference to the evidence upon which they were obtained, as domestic judgments, the rules applicable to the one, are applicable to the other, *The Marine Ins. Co. vs. Hodgson*, 6 *Cranch*. 206. The record was not offered to show the state of the pleadings, but to show, by the deposition of *Meany* in the Prize Court, that certain documents were on board at the time of the capture. For this purpose it was not admissible. *The Marine Ins. Co. vs. Hodgson*, 6 *Cranch*. 210. *Fitzsimmons vs. Newport Ins. Co.* 4 *Cranch*. 191. Besides, there are many papers in the record in question, which have nothing to do with this controversy; and as the defendant offered to read the whole without discrimination, if there were any not admissible, the court did right in rejecting the whole, though it might have been proper to read some one, or more. *Ellicott vs. Piersoll*, 1 *Peters*, 337.

*Third Exception.* If this exception can be maintained, we are carried back to the state of things which existed prior to the act of 1813, *ch.* 104. The plaintiff, as he went for a total loss on account of the condemnation, was bound to produce the sentence; and then, as is argued on the other side, he would lose his right to recover, if there should be

any thing in the sentence to show a breach of blockade, or any other violation of the contract, on the part of the assured. 7 *Cranch*. 432. And this would be the case, no matter how repugnant the sentence might be to the law of nations. It was this very evil which led to the passage of the act of 1813.

*Fourth Exception.* The form of the prayers in this exception is such, that unless the defendants are correct in each alternative, they cannot reverse the judgment; a distinct prayer not being made on each. They are all connected, and the prayers are based upon the truth of all the alternatives. If there is no evidence in support of any one, or the defendants in point of law are not entitled to all of the instructions prayed, they cannot have the benefit of any, though this court may think, they would be entitled to some of them, if they had been presented in the form of a distinct prayer. And it was incumbent on the defendants to show, that they had offered evidence in support of each of their alternative prayers, from which the facts assumed might be found by the jury. It was not the duty of the court to discriminate, and grant such as were right, and refuse the others; but if some were wrong, they were justifiable in refusing the whole. *Newson vs. Douglass*, 7 *Harr. and Johns*. 417. *Elliott vs. Piersoll*, 1 *Peters*, 337, 338. *Allegre vs. Maryland Insurance Company*, 2 *Gill and Johns*. 136. But suppose the court should have separated these instructions, and decided them singly, still it is contended, that their judgment is correct.

1. A general policy against all risks, and for whom it may concern, covers all risks, contraband and belligerent. *Hagedorn vs. Oliverson*, 2 *Maul. and Selw.* 485. *Buck and Hedrick vs. Chesapeake Insurance Co.* 1 *Peters*, 151. *Allegre vs. The Maryland Ins. Co.* 2 *Gill and Johns*. 163. *Hodgson vs. Marine Ins. Co.* 5 *Cranch*. 109. *Etting, et al. vs. Scott and Seamen*, 2 *Johns. Rep.* 162. It follows therefore, that the failure of the assured, to communicate

to the underwriters, that he intends to carry a contraband or belligerent cargo, can have no effect upon the policy ; as the very terms of the contract are evidence of such an intention. *Carter vs. Boehm*, 3 Burr. Rep. 1911.

A party would never ask for an insurance against all risks, unless he contemplated the probability of a contraband or belligerent cargo, as it would be useless to enhance the premium. *Buck and Hedrick vs. The Chesapeake Ins. Co.* 1 Peters, 160. The case at bar, is stronger than the case in 1 Peters, as it is manifest from the order of this case, that the assured did not, and could not know, of what the cargo would consist, nor to whom it would belong, and as a prudent man, he could only effect such an insurance, as would embrace perils of every description. In the order of the 9th of October, asking for insurance against all risks, and for whom it may concern, nothing is said about contraband, or from which a neutral character could be inferred ; and consequently the risk asked, was a belligerent risk, of which the underwriters are treated, as having knowledge. If the case stood upon that order, it would be free from all doubt, upon the authority of the case of *Buck and Hedrick* in 1 Peters. That the explanatory order of the 10th, did not, in the opinion of the underwriters, change the character of the risk, and reduce it from a war, to a peace risk, is proved by their refusal to reduce the premium. There was then, no deceit in the second order, and all parties considered the risk as remaining as it was before.

The second order was submitted, because some of the *Baltimore* policies contained a warranty against contraband, which if introduced must be complied with, whether material or not. A good reason then existing for the second order, why should the language of it be strained beyond the evident intention of the parties, which clearly was, to be covered against all risks, or why should the legal operation of the former order be restrained, by an act designed to enlarge it ? To construe the last order as a representation, or warranty of neutrality, would be to convert the



risk into a mere peace risk, when the assured was asking for, and paying the premium of a war risk. If none of the *Baltimore* policies contained a warranty against contraband, and there was no proof of a usage on the subject, it might be difficult to account for the second order. But as the proof is, the object is manifest, and perfectly consistent with the declared desire, to be covered against all risks. It is impossible to consider this last order as amounting to a misrepresentation. The assured fairly and truly told the underwriter all he knew, and in terms to awaken his apprehension, and put him on his guard; and the premium charged, shows, he was on his guard. The order in this case, cannot be considered as a representation of neutrality; for although *contraband* cannot be predicated of a neutral ship, here it does not *expressly* assert that there will be *contraband* on board, but that there *possibly* may be, and hence, a belligerent character might fairly be inferred.

If the defendants did not mean to insure a war risk, it was their duty so to have stipulated, and reduced the premium accordingly. *2 Johns. Rep.* 163.

The order here at farthest, can only be considered, as the representation of an expectation or belief, when the situation of the parties, with reference to the vessel, is taken into view. *Allegre vs. The Maryland Ins. Co.* *2 Gill and Johns.* 136, 159. The implication of neutrality, from the words of the order, not being necessary and inevitable, a warranty cannot be inferred. *Slight vs. Rhinelander*, *1 Johns. Rep.* 192. *Philips*, 82.

It is said that the knowledge of *Meany*, the captain, is to be imputed to the assured, the knowledge of the agent being the knowledge of the principal. This, though true perhaps, as a general rule, is not applicable to a case like the present, where from the relative situation of the parties to each other, such common intelligence was impossible. If the rule was universal, then the principal never could insure a lost vessel, if such loss was known to the master. *Genl. Int. Ins. Co. vs. Ruggles*, *12 Wheat.* 408. Again,

when the agent is in one country, and the principal in another, without knowledge in fact, and so tells the underwriter, can it be said, that he shall be so affected by the agent's knowledge, as to forfeit his policy? When he says to the underwriter that he has no knowledge, he puts him on his guard, and the premium is regulated accordingly.

If, however, these parties are to be affected with the knowledge of *Meany*, the policy being against all risks, and for whom it may concern, is nevertheless good. *Buck and Hedrick vs. Chesapeake Ins. Co.* 1 *Peters*, 161.

The *third* and *fourth* prayers assume, that if the ship was neutral at the time the policy was effected, she must remain neutral throughout the voyage. But this is not so. If it was, then, if by a subsequent declaration of war, a vessel, neutral at the time of the insurance, should become a belligerent, the policy would be gone.

It is necessary that a ship should be documented according to her national character; and the rule on this subject has nothing to do with neutrality. *Horneyer vs. Lushington*, 15 *East*. 46. *Oswell vs. Vigne*, *Ib.* 70. *Bell vs. Broomfield*, *Ib.* 364.

But there is no evidence to show the belligerent character of the ship, or upon which a prayer, with such an assumption, could be founded. The evidence only shows her to have been a neutral, with contraband on board. *Ludlow vs. Columbia Ins. Co.* 1 *Johns. Cas.* 337, 343. *Ludlow vs. Brown and Eddy*, 1 *Johns. Rep.* 1. *De Wolf vs. New York Fire Ins. Co.* 20 *Ib.* 214.

The *fifth* and *sixth* prayers assert, that the evidence of blockade, is contained in the sentence of condemnation, and the court was consequently called on to say, whether there was any such evidence in the sentence. It was a question of law to be decided by the court. Now, the sentence does not say that the captain had *knowledge* of the blockade, if in fact a blockade existed, nor does it say that he intended to violate it; and the mere attempt to enter a blockaded port, of which the party attempting has no knowledge,

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does not avoid the policy. *Fitzsimmons vs. The Newport Ins. Co.* 4 *Cranch*. 185. *Ib.* 198. *Yeaton vs. Fry*, 5 *Cranch*. 435.

Upon the plaintiff's exceptions, they contended,

That in this country, after condemnation, the owner never can regain the property condemned, as of his former estate, though in *England*, the law is different by statute. 2 *Marsh. Ins.* 570, 573. If the former owner, after condemnation, comes into possession of the property, he does so by a new title. *Act of Congress*, Dec. 31, 1792, sec. 13, and June 27th, 1797, sec. 1. *Williams vs. Armoyd*, 7 *Cranch*. 423. *Ib.* 432. *Hudson vs. Guestier*, 6 *Ib.* 285. *Jumel and Desobry vs. Mar. Ins. Co.* 7 *Johns. Rep.* 422, 423, 426. *McIver vs. Henderson*, 4 *Maul. & Selw.* 576. *Hallett vs. Peyton*, 1 *Caine's Cas.* 42. 2 *Shower*, 242. 2 *Marsh.* 501. *Havelock vs. Rockwood*, 8 *Dur. and East.* 270. And when the loss is total, there is no necessity for an abandonment, because then there is nothing which the abandonment could vest in the underwriters. 2 *Marsh.* 559.

The condemnation of the vessel in this case is equivalent to a total loss, and consequently the abandonment by the assured, conveyed no title to the underwriter. There was in fact nothing to abandon; nothing upon which it could operate. How then, can it be said, that the conduct of the assured afterwards, is a waiver of the abandonment? If the abandonment conferred no title upon the insurer, there was nothing to waive; and nothing with which the subsequent conduct of the assured can be said to have been inconsistent. 3 *Mason*, 86. 5 *Johns. Rep.* 324.

Even if *Meany* had purchased as the agent of *Thompson*, the plaintiff's right to recover for a total loss would be unquestionable; because, he purchased from those, to whom the title had passed by the condemnation and sale of the vessel, and a title thus acquired would not have been incompatible with the rights of the insurers. Such, however, was not the case, as after the condemnation, *Meany* ceased to be the agent of the assured. 2 *Wheat.* 412. 414.

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They referred to the correspondence between the parties, to show, that they did not suppose the plaintiffs had forfeited their right to recover for a total loss, by their adoption of the purchase by *Meany*. The refusal by the underwriters to pay, was placed upon other and distinct grounds. If they had a right to the vessel, they waived it by their omission to assert it in a reasonable time, and after full notice.

DORSEY, J., delivered the opinion of the court.

The first exception on the part of the Insurance Company, relative to the insufficiency of the preliminary proof having been abandoned, we are called to the consideration of the question raised on their second bill of exceptions; viz. Is the copy of the record of the prize court of *Porto Rico* competent evidence, "for the purpose of showing that the original papers, of which copies and translations, purporting to be inserted in said record, were on board the said ship *Budget*, at the time of her capture, and were acknowledged to have been so on board by the said *Meany*, the captain of said ship, in his examination upon oath, before the said Prize Court?" With the decision made by the county court on this question we fully concur.

The sentence of condemnation of the foreign prize court is evidence of the facts, which it purports to decide, in an action on a policy of insurance on the thing condemned; and was conclusive evidence thereof, until the act of assembly of 1813, *ch.* 164, reduced it to the character of mere *prima facie* proof.

But the proof upon which such sentence may have been predicated, is not, *per se*, admissible in such collateral action.

The utmost efficacy that could be given to it, would be, to permit it to have the same effect, as if taken in a former cause between the present litigant parties. When viewed in that light, it is clearly inadmissible, there being nothing in the record to show the impracticability of procuring in the usual way, the testimony of captain *Meany*, or the ori-



ginal papers referred to, or the testimony of the witnesses, who deposed that such papers were on board the *Budget*. The competency of the evidence offered, through *John D. Daniels*, forms the subject of our examination in the third bill of exceptions. And its offer is predicated upon the assumption, that a breach of blockade, was one of the grounds of condemnation, alleged in the sentence. The objection urged to the testimony is, that *Thompson & Bathurst* having given the sentence in evidence to the jury, could not subsequently be permitted to contradict, by the examination of witnesses, any of the facts which it professes to establish. There would be a semblance of reason and plausibility in this objection, if *Thompson & Bathurst* had offered the sentence as evidence of the truth of the allegations on which it professes to be founded. But the reverse is the fact; it was offered for no such purpose. On the contrary, the offer under the circumstances in which it was made, distinctly announced to the court, and the *Insurance Company*, that those allegations, as far as they presented any barrier to the right of the plaintiffs below to recover, were denied, and would be disproved. The only object in producing the sentence, other than that of sustaining the abandonment, was to prove, that by the act of a foreign Prize Court, the insured had been deprived of all property in their ship. There is therefore, no inconsistency, no violation of the policy, nor any principle of law, in the sentence, and testimony of *Danels*, being offered as evidence by the same party. The sentence was the cause assigned for the abandonment, and must be proved; or the abandonment would be a nullity, and give no right of recovery as for a total loss. But say the counsel for the Insurance Company, there was no necessity for producing in evidence the sentence of condemnation, as proof of capture was sufficient. Does the law warrant this assertion? The plaintiffs abandoned, not because of the capture, but of the condemnation. Admitting they were notified of the capture at the time of its occurrence, of which there is no evidence, they

may have hoped, that the ship would have been released; and were therefore unwilling to relinquish to the insurer, the profits anticipated from the enterprize. Were they bound to have done so? Assuredly not. They waited the event, and abandoned on the ground of condemnation. If in a reasonable time after notice of capture, they failed to abandon, they lost the privilege of doing so, and could not have recovered for a total loss, on any abandonment for that cause subsequently made.

But the unanswerable objection to the argument is this; that no abandonment was made on the ground of capture, and consequently, the proof thereof would not entitle the insured to recover for a total loss. The principle is not now to be controverted, that in recovering for a total loss, founded on an abandonment, you must prove as the basis of your action, the cause assigned in the notice. Failing to do this, you cannot sustain your pretensions by proving another cause, which if made the subject of abandonment, would have warranted a recovery. The production of the sentence of condemnation, is therefore an indispensable link in the chain of testimony, requisite to the prosecution of a suit for a total loss, grounded on such an abandonment as that presented by the record before us. If the objection to the testimony be a sound one, *Thompson & Bathurst* were on the horns of a dilemma. To entitle them to recover they must produce the sentence, and the production of the sentence rendered a recovery impossible. To sanction the objection insisted on, would be judicially to repeal the act of 1813, and to give to the sentences of foreign Prize Courts, that conclusiveness of which by the act of 1813, they had been divested. That act declaring, "that no sentence, judgment, or decree, final, or interlocutory, of any judge, court, board, council, or tribunal, having or exercising municipal admiralty, or prize jurisdiction, without the limits of the *United States*, or its territories, shall be conclusive evidence in any case or controversy in the courts of this

State, of any fact, matter or thing contained, stated or expressed, except of the acts and doings of such foreign judge, court, board, council, or tribunal.”

In the aspect in which this question was presented to the county court, their disposition of it is in accordance with the views of this court. But we deny the assumption upon which the objection was founded; viz: that the sentence disclosed a condemnation for the breach of blockade. The sentence states no such fact. It alleges that *La Guira*, the port of destination of the *Budget*, was on the 23d of December, the day of the condemnation, a blockaded port; but not that it was so at the time of the capture, or the attempt to enter it. The testimony of *Daniels* was on that account wholly irrelevant to any matter at issue in the cause; and the county court, on that ground erred, in over-ruling the objection to its going to the jury. But this error, being in its nature wholly immaterial, and having no tendency to influence the minds of the jury, in forming their verdict upon the matters really in issue before them, forms no ground for the reversal of the judgment rendered on the verdict.

The first branch of the first prayer, in the fourth bill of exceptions, is, “that the terms of the order for insurance and the policy, in this case amount to a warranty, that the ship *Budget* was a neutral ship, bound upon a mercantile voyage, with permission to carry some articles contraband of war, but in every respect to be employed and navigated as a neutral ship.” To sustain this idea of warranty, the following endorsement on the order of insurance is relied on: viz: “although our advices give us no reason to believe there will be any articles contraband of war on board the ship *Budget*, still, as we wish to be covered against all possible risk, we request your reconsideration of the written application including articles contraband of war.” This, say the counsel for the insurers, is equivalent to an express asseveration of neutrality, as articles contraband of war have neither meaning nor existence, but in reference to a neutral ship. Suppose this indissoluble connection, between arti-

cles contraband and a neutral ship be conceded ; does the inference of warranty of neutrality in this case, necessarily follow ? Can it be denied, that the original order covered belligerent as well as neutral risks ? Was the endorsement on the order, intended to reduce the premium, by diminishing the risks insured against, to those of a neutral character only ? Was it so understood by the underwriters ? Their continuing to demand the same premium is unanswerable proof to the contrary. Do the terms of the endorsement intimate such an intention ? So far from it, they reiterate the contrary by renewing the same offer, and declaring their “wish to be covered against all possible risk.” Do they in express terms, or by necessary inference assert, that there will be articles contraband of war on board ? The reverse is the truth ; they state that their advices give them no reason to believe that such will be the fact ; but should such a contingency happen, they seek by insurance an indemnity against it. In other words, the order in effect declares the *Budget* may be belligerent property ; if so, we require protection against all perils, incident to her, in that character. Or she may be in point of fact neutral, in that event, we ask an indemnity against every casualty, not explicitly excepted, which may befall her as such. It neither asserts her to be the one, nor the other, but provides an exemption from loss, let her condition in that respect be what it may.

That the original order, with the terms “against all risks,” and “for account of all whom it may concern,” covered both neutral and belligerent risks, has been admitted, and could not be denied. Had it then been the design of the second offer, to reduce the liabilities of the underwriters to neutral risks only, and obtain a consequent reduction of the premium of insurance, it would not have omitted an express assertion or warranty of neutrality. In the rejection of this part of the said first prayer, we therefore concur with the county court.

By the remaining part of this first prayer, in the third bill of exceptions, the instruction required of the court,



was, that “if the jury find from all the evidence, and admissions in the cause, that the ship *Budget*, on the voyage insured, was entirely laden with munitions of war, and that the same were destined for the service of the *Colombian* government at *La Guira*, partly to arm a vessel of war called the *New Orleans* belonging to the said government, and in part to establish a *depot* of arms at *La Guira* for the service of the said government; or that if said ship was to be offered for sale to the *Colombian* government whenever she might be wanted; or that the said *Meany*, captain of the *Budget*, was to be employed in the naval service of said government; or that a breach of blockade was committed by the *Budget*, as set forth in the sentence of condemnation of the *Prize Court of Porto Rico*; that then the policy is violated, and the plaintiff is not entitled to recover.” In *Buck & Hedrick vs. The Chesapeake Ins. Co.* 1 *Peters*, 159, the *Supreme Court of the United States* have declared, that “courts of justice are not bound to modify or fashion the instructions moved for by counsel, so as to bring them within the rules of law.” If it were otherwise, instead of deciding the question submitted as presented by the counsel, they would in fact themselves become counsel, by raising the question, which as a court they must subsequently determine, and by analogy in every case it would be error, to reject a prayer asking more than the principles of law would warrant, unless at the same time the court gave an instruction, as favorable to the interest of the party praying, as if they were responding to a prayer aptly formed to elicit such instruction. The law, for wise reasons, imposes upon the court no such double and inconsistent duties of counsel and judge. They may, if they see fit, content themselves with a simple refusal of any prayer not sanctioned by the rules of law. The court below were therefore justified in an unqualified rejection of the said remaining part of the first prayer, because they were required to give it, if the jury were satisfied of the existence of any one

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of four enumerated alternatives ; one of which, (in relation to a breach of blockade,) was not a question which the court could have submitted to the finding of the jury, for the reasons stated in our opinion on the second bill of exceptions. But according to our view of the subject, the court would have been right in refusing the instruction prayed, though a separate prayer had been framed on each alternative.

In the case of *Buck & Hedrick vs. The Chesapeake Ins. Co.* before referred to, the *Supreme Court* say, “a knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their trade, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to the underwriters.” “No underwriter can be ignorant of the practice of neutrals to cover belligerent property under neutral names, or of the precautions ordinarily resorted to, that the cover may escape detection.” Neither can the *Maryland Insurance Company* in this case, be deemed uninformed of the practice of chartering neutral vessels at *London*, and elsewhere, by the agents of the *Spanish South American* governments, for the transportation of military stores, and troops ; nor of such vessels being sold to those agents, deliverable in *South America*, for the purpose of being there used as national cruisers. These were facts of universal notoriety in the commercial world, at the time of the insurance on the *Budget*; are a part of the public history of that epoch, against the light of which this court cannot shut their eyes, and of which the law imputes knowledge to the appellants. Nay, it is more than probable, if not apparent, that these were the belligerent perils, mainly contemplated by the parties in their compact of insurance; and against which the underwriters especially designed to indemnify.

It is admitted on both sides, that the *Budget*, until her arrival at *London*, was well known as an *American ship*;

and owned, commanded, and navigated as such. The letters of *Meany*, the captain, to his owners, communicated to the underwriters, and on which the policy was effected, informs them of what? That he had sold the ship? No. That he had “chartered” her to go “to one of the following ports in the *Colombian* government—*La Guira*, *Santa Martha* or *Carthagen*.” And upon these facts, with the aforementioned knowledge of the usage of neutrals in that trade, the underwriters were called on to insure the ship, against all possible perils that could betide her, either in a neutral or belligerent character. The asking of such an insurance, is of itself demonstration, that protection against dangers ordinarily incident to neutrality, was not all that was desired. To suppose that for such a limited liability, they offered (as they did,) more than double the premium necessary to the attainment of such an object, would be to impute to them a species of senseless prodigality, never before deemed applicable to an *American* merchant. The idea of the enhanced premium being paid on account of a *bona fide* regular belligerent ownership, is repudiated by the letter of *Meany*, on which the insurance company acted, when the policy was underwritten. That announced the chartering, not the sale of the *Budget*. What kind of belligerent risks were they then, for which, they designed to become responsible? The strong probability, if not the natural presumption is, that they assumed the liability for those very contingencies, for which they are now called upon to answer; and which were contemplated by both insurer and insured, from their knowledge of the character of the trade by neutrals from *London* to *Colombia*. No other rational motive could have prompted *Thompson & Bathurst* to have sought such an insurance; and the facts in the cause warrant the assumption, that the underwriters intentionally assumed the responsibility to the full extent into which they were invited to enter. Being uncertain, whether it could be called a neutral or a belligerent risk; where the ship, though in fact neutral, was in contem-

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plation of law regarded as belligerent; *Thompson and Bathurst* required not only a cover, to neutral and belligerent ownership, but also against "all risks," or "all possible risk." Thus manifestly seeking to obtain security against other losses, than those which usually attend neutral and belligerent ownership. And such must have been the understanding of the insurance company, from the knowledge with which they are affected. In this view of the subject, we are more than sustained, by the case of *Goix vs. Knox*, 1 *Johns. Cases*, 340; where it is said, "the insuranse is against all risks." This expression is vague and indefinite; but if we allow it any force, it must be considered as creating a special insurance, and extending to other risks than are usually contemplated. We are inclined to give it a liberal construction, and apply it to all losses, except such as arise from the fraud of the insured. "The terms used are sufficiently broad to comprehend every other loss." This doctrine was affirmed in *Skidmore vs. Desdoity*, 2 *Johns. Cases*, 77.

We have so far, examined the effect of the order for insurance, in reference to the question of warranty of neutrality; and in doing so, have regarded it as incorporated in the policy. By the second prayer in the third bill of exceptions, the county court were required to give the same instruction to the jury, which was applied for in the first, except that the order for insurance in the first prayer was assumed to operate as a warranty, in the second as a representation. If when regarded as a warranty, the order for insurance, as we have endeavored to show, can afford no relief to the appellants, there is no pretext for an attempt to invoke it to their aid, when viewed in the light of a representation.

We approve of the county court's refusal, to grant the second, third and fourth prayers, for the same reasons which induced us to sanction their rejection of the first; and we sustain them in their denial of the fifth and sixth prayers upon the grounds, stated by us in the examination



of the second bill of exceptions. We also concur in opinion with the county court, in the rejection of the seventh, eighth and ninth prayers; believing that the assured were under no obligation to communicate existence of those facts, the concealment, or non-disclosure of which, is relied on as the ground for vacating the policy. In our remarks on the first prayer, in the third bill of exceptions, we have so construed the contract of insurance, as to fix upon the underwriters a liability for losses arising from the transportation of hostile stores, troops, &c. the facts alleged as unduly concealed. The obligation to disclose is limited to such facts, as would vary the risk, or nature of the contract. No communication need be made, of what is necessarily implied by the contract. Where the necessity of disclosure, when the insurers agreed to run the hazard of the very peril concealed? If the underwriters have assumed the risk, to which the ship may be subjected in transporting a cargo of hostile stores, can it be requisite, that they should be informed, that such a cargo is to be laden on board the ship? On an assurance for account of whom it may concern, is the assured bound to inform the assurer, that there exists a belligerent owner, or twenty of them, if there be so many? Assuredly not.

If the insurers designed to assume a mere neutral risk, (of which we cannot indulge a momentary belief,) they were not led into this error by the conduct of the insured. Every thing, short of express information to the contrary, was disclosed to them. They were told, that insurance was required "for all whom it may concern," against "all risks," or "all possible risks;" they were aware of the trade carried on by neutrals from *London to Colombia*. If under such circumstances, they neither charged an adequate premium, nor sought the further information requisite to lead their judgment to a just estimate of their responsibility, they must bear the consequences of their own misprision.

Having disclosed our views upon the exceptions taken, in behalf of the underwriters, we are now brought to the ex-

amination of the bills of exceptions on the part of the assured, which present the question, whether the total loss claimed, was converted into a partial loss, by *Meany's* purchase of the *Budget* for account of the owners, and their subsequent ratification thereof, as stated in the bills of exceptions. To sustain the affirmative of this proposition, in addition to some *American* authorities on the subject, that part of *Ld. Mansfield's* opinion, in *Goss vs. Withers*, 2 Burr. 694, has been much relied on, which declares, that "the insurer runs the risk of the insured, and undertakes to bear the loss actually sustained, and can be liable to no more. So that if after condemnation, the owner recover the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must bear the loss so actually sustained." This may be sound doctrine in *England*, where it is held, that the right to recover for a total loss, is not made absolute by the state of facts, on which the abandonment is founded, continuing to exist at the date of the abandonment, but is dependent on subsequent events. In this country, a different rule prevails. The right to recover of the assurer, for a total loss is complete, if the loss which is its basis, continue at the time of the abandonment, and of this consummate right or privilege, the assured cannot, without default, be deprived, but by their consent expressed or implied. Like other privileges, it may be waived by the insured, either in express terms, or by their acts inconsistent with its existence.

If after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or retaken by the crew, or be recovered and delivered to the owners, who claim, and use her as their own, they possess her under no new title or right of property; their acts are the assertion of their original ownership, and therefore inconsistent with the abandonment, which if sustained, casts the right of property on the insurers. Both cannot therefore stand together; the necessary inference is, that the insured, by the resumption of their ownership, surrendered their rights

under the abandonment. But where a condemnation has taken place, the assured, apart from all statutory regulation on the subject, is divested of all property in the ship, and in it, if purchased by themselves, or their agents, they acquire a new and independent title to which their subsequent acts of ownership are imputable, and not to their original proprietary rights. An intention to waive the abandonment is not the natural inference from their conduct. There is no inconsistency in their claiming for a total loss under the abandonment, and asserting the right of property under the newly acquired title. As against all the world, save the underwriters, the assured as purchasers, have an incontrovertible title. And it is conclusive even against them, if they consented to its acquisition, or have waived the right to impeach it. We are aware, that this question has been apparently otherwise decided in some of the *United States*, and especially in *New York*; where in the honest zeal for the protection of insurers, it is respectfully suggested, they have stretched their doctrines upon this subject to an unjust invasion of the rights of the insured, and gone beyond what the policy, or analogies of the law would sanction. The principle contended for in the argument, as fairly deducible from the *New York* cases is, that the acceptance by the insured for his own benefit, of a purchase of the thing insured, made by the captain for account of his owner, is *per se*, a waiver of the abandonment; and converts the otherwise total, into a partial loss. To this universal and unqualified proposition, we cannot assent. Whilst we admit, that the law has wisely erected around insurers, an impenetrable barrier to fraud and injustice on the part of the insured, we insist, that in doing so, it has gone no further than the necessity of the occasion demanded, and, that it has not been unmindful of providing a like protection for the insured, against practices of a similar character emanating from the insurers. That whilst *uberima fides* is exacted of the insured, a like course of conduct must be practiced by insurers. That to neither

party, is it permitted to do acts, the natural tendency of which is injustice, and imposition on the other. We freely concede, that neither the insured in person, or through the instrumentality of others, either before, or after the condemnation of the thing insured, possesses, where an abandonment has been made, an unqualified right to become its purchaser, for their own benefit. Such purchases, after condemnation, where a total loss is claimed, are ever subject to this qualification; that the insurers have the right or privilege, if they see fit, to exercise it within a reasonable time after a knowledge of the purchase, to elect to become themselves the purchasers; and if the insured refuse to surrender the bargain, the total is converted into a partial loss; or in other words, the insurers, by their election, having made the thing insured their own, have a right to deduct from the plaintiff's claim, the amount of the insurance, first subtracting therefrom, the *quantum* of loss actually sustained by the insured, by reason of the perils insured against. By an abandonment, the rights of the underwriters relate back to the date of the disaster, not of the abandonment. All intermediate acts of the captain, and agents of the insured, inure to the benefit of the insurer. Any purchase therefore made by such captain or agents, no matter for whose account, if in due season adopted by the underwriters, becomes their own. This view of the subject, so consonant to reason, justice, and policy, is not without support from the decisions from *New York*, which have been relied on by the Insurance Company. In *Robinson & Hartshorne vs. United Ins. Co.* 1 *Johns.* 611, *Woodworth*, of the Court of Errors of *New York*, says, "I subscribe to the correctness of the rule, that the insurers ought to decide immediately after notice, whether they will avail themselves of the purchase made by the agent." In *Jumel and Desobry vs. Marine Ins. Co.* 7 *Johns.* 426, Chief Justice *Kent*, in delivering the opinion of the court, speaking of the repurchase of a vessel by the captain, for the benefit of the owner, says, the insurers



“have nothing to do with the purchase of the vessel, *unless at their election*, is a general principle of insurance, &c.” and in *Ogden vs. Fire Ins. Co.* 10 Johns. 180, the court, in relation to a purchase made by the assured after abandonment, state, that “if he persevere in the claim for a total loss, he must surrender to the insurer the benefit of the purchase; and this rule is founded in sound policy, to prevent fraudulent speculations upon a loss, at the expense of the insurer.”

The principle of law upon this subject as recognised by us, gives protection to both parties, and is founded on equal and reciprocal justice, as far as the nature of the case will admit of. Adopt the rule as contended for by the Insurance Company, and you deal unjustly by *Thompson & Bathurst*, by rendering them without their consent purchasers of the ship; not at the price they stipulated to pay, but perhaps at double that amount; at her valuation at the port of departure, not her value at the port of purchase. You also inflict a serious injury upon underwriters, by depriving them of all chance of being restored to the property condemned, or its value, at a reasonable salvage, through the instrumentality of the insured, or their agents, who would never become purchasers where no ray of hope was left them, of being permitted to enjoy any benefit by the purchase.

It is alleged, that unless the assured committed a fraud upon the underwriters, by an excessive valuation, they have no just ground to complain of the exercise of the right now claimed by the Insurance Company. But is the allegation well founded? Is it just, that the assured should receive their ship at the port of condemnation, at her full value, where she may be so surrounded by perils and difficulties, as not to be worth one-half of what she was, at the port of departure; or would have been, at the port of destination, to which her safe arrival had been guarantied? If in the navigation of the *Budget* from *Porto Rico* to *Baltimore*, or in attempting to complete the voyage insured,

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after the purchase, she had been lost by any of the perils insured against, could *Thompson & Bathurst* have recovered, not only the entire valuation in the policy, but in addition thereto, the purchase money paid for the ship? Or indeed any thing but the loss, which had accrued to the time of the purchase? Unquestionably not. Is there then no ground for complaint, no hardship in the case, that *Thompson & Bathurst* after paying a full premium of indemnity for an entire voyage, should not be covered by the policy, for more than one-half of it? That by legal presumption, they are to be held, as restored to their property, which by necessary implication revives the policy for the voyage; and yet, that they are entitled to no further protection under it? The law raises presumptions to subserve the ends of justice; never to work such absurdity and injustice as would follow the presumption now insisted on.

That the election of the assurer to adopt the purchase, should be made without delay, after the knowledge of the sale, is so forcibly enjoined by the plainest dictates of reason and justice, that it can hardly be necessary to invoke, either reason, argument, or illustration, to its support. He surely ought not to be permitted to lie by, and speculate on contingencies, at the risk and cost of the assured. If the vessel arrive in safety from the port of sale, having evaded the perils by which she was beset, and turns out upon minute inspection to be of greater value than the price paid for her, or if she has earned freight, or been profitably employed, or there has been an improvement in the price of ships, then will the assurer claim the advantages of the purchase. But on the other hand, if the vessel should be unprofitably employed, lost, damaged, or from any other cause, become of less value than when sold, then would all the burthen be cast on the shoulders of the insured. With the re-purchase it would be alleged they had no concern. This would be playing a safe game for the underwriters, but a ruinous one to the assured, and wholly inconsistent with that frankness and fair dealing which pervades every branch of insurance law. This

*dictum* of *Ld. Mansfield* in *Goss and Withers*, to the extent now attempted to enforce it, has not been confirmed by any subsequent *English* adjudication: on the contrary, it is in direct opposition to the law, as admitted by *Ld. Kenyon*, and the counsel on both sides, in the case of *McMasters vs. Shoolbred*, 1 *Esp. Rep.* 237.

But concede for the moment that we are in error in the views we have stated, and that the general rule as established in *New York* be correct; viz: that the insurers have a right to regard a purchase of the subject matter of insurance, by the insured or their agents, after its condemnation, as a waiver of the abandonment, and a conversion of the total, into a partial loss. If the insurers agree that such purchase shall not be a waiver of the abandonment, and the assured unequivocally evince his intention not to waive it; or if by the acts of both parties, it plainly appears, that it was not the intention of either, that it should be so regarded; would the abandonment then be waived? Certainly not. The right of the underwriter so to regard it, is of that class of rights, which may be waived, or insisted on, at the election of their possessor. Did they elect to waive their right in this case? In our opinion the proof sufficiently establishes that fact. On the 12th of March, 1823, *Thompson & Bathurst* address a note to the underwriters, stating the receipt of advice from captain *Meany*, that he had purchased the *Budget* after her being condemned, and drawn on them for the amount; and desiring to know, if they might calculate on receiving from the appellants the amount insured in their office, at the time stipulated in the policy, ninety days from proof of loss. The nature of this communication cannot have been misinterpreted. It was an explicit avowal of a claim for the whole "amount insured," for a total loss; and it was so understood by the underwriters, who in their answer of the same date reply, "that not having seen captain *Meany's* protest, we cannot satisfactorily make you a reply, because on it mainly depends the ground for payment, which (when presented)

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if found in order, the loss is payable ninety days after proof and adjustment thereof." They do not, in this letter, intimate any claim to the ship which had been purchased, or that instead of paying as demanded of them, the whole "amount insured," by reason of the purchase for the owners, their liability was limited to the price at which the ship was sold. The notice of abandonment had been given on the 6th of February, 1823, accompanied by a certified copy of the condemnation.

The object to be attained by the production of the protest, was to ascertain whether they were responsible at all ; not what was the measure of their responsibility. It could not possibly give any information as to the purchase, having been made long anterior. On the 7th of May, (the ninety days mentioned in the policy having expired) payment was again demanded of the Insurance Company, which they declined for want of documents to prove the loss : alleging, that "as the vessel is now here, no doubt they can be produced." On the 21st of May, the insured, after having presented all the documents they had received, address the underwriters a third time, urging the settlement of the loss, and offering to procure in a reasonable time, if possible, any other documents which might be deemed necessary to elucidate the condemnation of the ship. On the 24th of May the Insurance Company reply to this communication, offering to advance to the insured \$4498 75, upon their and *Robert Oliver's* joint note at six months, bearing interest; and requiring them at the expiration of that time, or sooner, to furnish the following documents relative to the ship *Budget*, viz: the proceedings of the Court at *Porto Rico*; the log book, or authenticated copy thereof; the charter party, or an authenticated copy: upon receipt of which, and their proving satisfactory, an adjustment of the loss was to take place. This proposition was manifestly made, (in accordance with usage) that the insured might sustain no injury by delay, but be put in possession of the identical amount he would be entitled to re-



ceive, upon producing the documents required, or as they alleged, customary proof of loss; upon the production of which, if satisfactory, the note demanded, was to be cancelled or given up. *Thompson & Bathurst*, in their letter to the underwriters of the 26th of May, say, “we consider the proofs already handed you, as fully establishing the capture and condemnation of the ship *Budget*; still, we do not hesitate in trying to procure the documents you have pointed out, and have therefore written for them by a vessel that sailed yesterday for *Porto Rico*. We should esteem it an accommodation, your now paying us the loss, in the same manner the *Phoenix* Insurance Company have done, viz: by giving our note for the same at six months date, with interest, *being as a security for our procuring such further documents as may be requisite*; but we prefer forfeiting that temporary advantage, to giving a note in the manner you prescribe.” On the 28th of May, the Insurance Company, in their answer to the last preceding letter, state, “that the proofs produced in the case of the ship *Budget* are not satisfactory, or such as are usually produced by the assured, in similar cases, to entitle the assured to claim a total loss. On that score we beg leave to refer you to our letter of the 24th, and what we verbally communicated some time ago. With respect to an accommodation, we have no objection to grant one to the extent treated of in our last, on your note with satisfactory security; which is in conformity with the custom of this company, and from which we cannot deviate; at the same time, we wish you to understand, that it is neither meant nor intended, as paying a loss, which in our opinion, is not fully established. Should you not approve of our terms, you will of course have to wait until the documents sent for are received, and when received, if satisfactory to this company, no unnecessary delay will be made in paying the loss.” All the documents furnished, and those demanded, were for the purpose of satisfying the underwriters, whether they were liable for any loss. They could throw no light upon the question, whether their lia-

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bility was for a total, or partial loss. But for the purchase, made by captain *Meany* for the owners, that question could never have arisen. The loss could not have been otherwise than total. With respect to this purchase, the documents sought for were known to be silent. Of the purchase, information had been given by the assured in their note of the 12th of March, 1823, and no further intelligence on that subject had been required. On that head the underwriters were satisfied. Their only dissatisfaction, their only objection to pay, as for a total loss, was, that the customary proof of loss, showing any liability on their part, had not been furnished. And to indemnify the assured for the delay in the payment of their claim, they proposed to them the grant of a loan, for the precise amount insured, after deducting the premium note, and \$1 25, the cost of the policy, cautiously providing that this accommodation should not be regarded "as paying a loss," solely on the ground, that a liability on their part had not been fully established. If they had designed, in the event of their being held responsible for the loss, to take to themselves the benefit of captain *Meany's* purchase, they ought, within a reasonable time after it was made known to them, to have announced their determination to do so. Had this been done, *Thompson & Bathurst* might have repudiated the purchase made on their behalf, as they were under no legal obligation to sanction it. They had a right to conclude, nay, they could draw no other conclusion from their correspondence with the underwriters, than that they were to be paid as for a total loss, as soon as they could make it appear that they had a right to recover any thing. By such conduct, the underwriters are to be regarded as having waived the privilege of taking the purchase of *Meany* to themselves, or of relying on it as a waiver of the abandonment. To permit them to do so at the time, and under the circumstances in which they claim to exercise this right, would be a fraud upon the assured; an act of injustice towards them which no judicial tribunal should countenance.

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Concurring with the County Court, in their opinion on all the exceptions on the part of the defendants below, as far as concerns their appeal, we affirm the judgment; but dissenting from the opinions on the exceptions taken by the plaintiffs below, on their appeal the judgment is reversed, and judgment entered according to the agreement of the parties set forth in the record.

JUDGMENT ENTERED ACCORDINGLY AS FOR A TOTAL LOSS.

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WATCHMAN AND BRATT vs. CHARLES CROOK, Jr. *et al.*  
June, 1833.

Whatever may have been the principles contained in the more ancient decisions, upon the legal effect and operation of contracts containing various covenants, the strong bearing of the courts in more modern times, has been to disencumber themselves from the fetters of technical rules, and to give such a rational interpretation to contracts, as will carry the intention of the parties into full and complete operation.

W contracted with C by an agreement under their seals, that he would furnish materials, and construct, and put up for C, a high pressure steam engine of certain specified proportions and power,—“the whole to be finished, and delivered at the factory of C, and there properly fitted up, and put into effective operation by and at the charge of W, within 90 days from the date of the agreement. In consideration whereof, C agreed to pay W for said engine, so as aforesaid to be constructed and put up, the sum of \$3700, in the following proportions; \$100 each week, as the work progressed, until the same should be finished and put up as aforesaid, when the sum of \$1200, including the weekly advances, was to be paid; the residue of the consideration \$2500 was to be paid in six, nine, and twelve months, from and after the said engine should have been put into full and effective operation to the full extent and meaning of the said covenant.” C, agreed also, that he would provide and pay for the brick and stone work necessary for putting up the boilers of said engine, and likewise pay for the brick and stone work. W further agreed to warrant and insure the faithful performance of the engine, for the term of twelve months from the time it should be put into operation as aforesaid. **HELD**, that upon the true construction of this covenant, 1. That the parties contemplated the completion of the engine before the weekly payments would amount to the sum of \$1200. 2. That the time limited for the completion of the engine was of the essence of the contract. 3. That W was

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not entitled to recover the \$2500 under the covenant, until he had complied with the stipulations of the contract, as well in relation to the time fixed on, as to other particulars. 4. That it was not necessary for C to provide the brick and stone work for putting up the boilers, before the boilers would be in a state of readiness to be put up, of which fact, it was the duty of W to inform C in due time.

Where a covenant exists to do a particular piece of work, if after the work is done, though not pursuant to the contract, the party for whom it is done accepts it, it would seem to be right and proper that he should pay for it, what it is worth. Justice requires this, and the principles of the law do not forbid it.

Where the County Court decides a cause upon general demurrer, against the plaintiff, and their judgment upon appeal is affirmed, this court will not award a *procedendo*.

The case of *Terry vs. Duntz*, 2 *Hen. Black*, 389, overruled.

#### APPEAL from *Baltimore County Court*.

This was an action of *Covenant*, instituted by the appellants, against the appellees on the 7th February, 1827, on an agreement dated the 12th September, 1825.

The declaration stated, for that whereas heretofore, to wit, on the 12th of September, in the year 1825, at, &c. by a certain covenant then and there made, and agreed upon between the said plaintiffs and defendants, (which said covenant sealed, &c.) it was witnessed amongst other things, that for the consideration thereafter mentioned, the said *Watchman & Bratt*, the plaintiffs, had bargained and agreed, and by the said covenant did bargain and agree to and with the said defendants, by the name of *Charles Crook, Junior and brothers*, that they the said *Watchman & Bratt*, the plaintiffs, should and would furnish good merchantable materials, and construct, make, fit, and put up, in a good, faithful and workman-like manner, for the said *Charles Crook, Junior and brothers*, the said defendants, a high pressure steam engine, of thirty horses power, to work at a pressure of forty-five pounds to the inch, with a cast iron cylinder with three boilers of iron, a quarter of an inch thick, to be nineteen feet long, thirty-six inches diameter, and a flue proportioned thereto, the whole to be finished and delivered at the factory of the said *Charles Crook, Junior and*



*brothers*, and there properly fitted up, and put into effective operation, by and at the proper expense and charge of the said *Watchman & Bratt*, within ninety days from the day of the date of the said agreement. In consideration whereof, the said *Charles Crook, Junior and brothers*, the said defendants, by the said covenant, agreed to pay the said *Watchman & Bratt*, the plaintiffs, for the said engine, so as aforesaid to be constructed, made, and put up, the sum of thirty-seven hundred dollars, and obliged and bound themselves to pay the same in the following proportions, to wit: to pay the sum of one hundred dollars each week, as the work progressed, until the same should be finished and put up as aforesaid, when the sum of twelve hundred dollars, including the weekly advances aforesaid, was to be paid; the residue or balance of the said consideration, that is to say, twenty-five hundred dollars was to be paid in three equal instalments, payable at six, nine, and twelve months, from and after the said engine should have been put into full and effective operation, to the full extent and meaning of the said covenant. And the said defendants also promised and agreed by the said covenant, that they would provide and pay for the brick and stone work necessary for putting up the boilers aforesaid, and likewise pay for the brick and stone. And it was further agreed by the said covenant, that *Watchman & Bratt*, the said plaintiffs, were to warrant and insure the faithful performance of the said engine, for the term of twelve months from the time it should be put into operation as aforesaid. And the said plaintiffs further aver, that after the execution of the said covenant, and of good merchantable materials by them furnished, (except a fly wheel, crank, and shaft, which were furnished by the said defendants, to be used in the construction of the said engine, of their own accord, and which constitute only a small portion of the value of the materials used in the construction of the said engine,) they the said plaintiffs, did construct and make in a good, faithful, and workman-like manner, for the said defendants, a high pres-

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sure steam engine of thirty horse power, to work at a pressure of forty-five pounds to the inch, with a cast iron cylinder, with three boilers of iron a quarter of an inch thick, nineteen feet long, thirty six inches diameter, and a *flue* proportioned; and that afterwards, to wit, on the first day of January, eighteen hundred and twenty-six, the said plaintiffs delivered the said engine, cylinder and boilers, thus constructed as aforesaid, at the factory of the said defendants, and there properly fitted up, and put the same into full and effective operation, at the proper expense and charge of the said plaintiffs, and that the said steam engine, thus furnished, constructed, and put into full and effective operation, was by the said defendants then accepted, retained, and from thence hitherto hath been used and employed by the said defendants at their factory aforesaid. And the said plaintiffs further aver, that after the said engine was so as aforesaid put into full and effective operation, at the factory of the said defendants, and by them there accepted, and before the commencement of this action, the term of twelve months had fully expired. Nevertheless, the said defendants have not paid the said plaintiffs the aforesaid instalments at six, nine, and twelve months, by the said defendants to be paid as aforesaid, and which amount to the sum of twenty-five hundred dollars, nor any part thereof, and so have not kept their said covenant.

*Second breach. 1st count.* And the said plaintiffs for further breach of the said covenant, say, that after the execution of the same, they of good merchantable materials by them furnished, (except a fly wheel, crank and shaft, which were furnished by the said defendants of their own accord, to be used in the construction of the said engine, and were so used, and which said fly wheel, crank and shaft, constituted only a small part of the value of the materials, used in the construction of the said engine,) they, the said plaintiffs, did construct and make, in a good, faithful, and workman-like manner, for the said defendants, a high pressure steam engine of thirty horse power, to work at a pressure of forty

five pounds to the inch, with a cast iron cylinder, with three boilers of iron, a quarter of an inch thick, nineteen feet long, thirty-six inches in diameter, and a flue proportioned thereto, and were ready and prepared to deliver and properly fit up the said engine, at the factory of the said defendants, and to put the same into full and effective operation, on the eleventh day of December, in the year eighteen hundred and twenty-five, according to the said covenant; but the said defendants did not provide the brick and stone work necessary for putting up the boilers of the said engine; by reason whereof the said engine could not be fitted up and put into full and effective operation on the day and year aforesaid, and the said plaintiffs were thereby prevented from fitting the same up, and putting the same into full and effective operation on the day and year aforesaid: by reason whereof, the said defendants became liable to pay to the said plaintiffs, the sum of twenty-five hundred dollars, in instalments of six, nine and twelve months, from the day and year last aforesaid. Yet the said plaintiffs say, that although the said term of twelve months had fully expired and ended before the institution of this suit, yet the said defendants had not paid the said sum of money, nor any part thereof, and so have not kept their covenant aforesaid.

*Second Count.* After referring to the covenant as before set forth, the plaintiffs averred, that after the execution of the aforesaid covenant, to wit, on the 20th December, 1825, at, &c. they of good merchantable materials, by them furnished, did construct, make, fit and put up, in good, faithful and workman-like manner, for the said defendants, a high pressure steam engine of thirty horse power, to work at a pressure of forty-five pounds to the inch, with a cast iron cylinder, with three boilers of iron, a quarter of an inch thick, nineteen feet in length, and thirty-six inches in diameter, and a flue proportioned thereto, and the said engine with the appurtenances aforesaid, they, the said plaintiffs, delivered, fitted up, and put into effective operation, at the

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factory of the said defendants, in the city of Baltimore. And the said plaintiffs further aver, that the said engine and appurtenances were not fitted up and put into effective operation, at the factory of the said defendants, within the term of ninety days from the date of the said covenant, because they say, that the brick and stone work necessary for putting up the boilers in the said covenant mentioned, and without which, the said engine could not have been fitted up and put into effective operation, were not provided within the said term, by the said defendants, their agents or servants. And the said plaintiffs further aver, that the said engine and appurtenances so by them fitted up as aforesaid, were accepted by the said defendants, and by them retained and used from thence hitherto; and although the term of twelve months had fully expired and ended, after the putting the said engine into effective operation, and its acceptance as aforesaid, and before the bringing of this action. Nevertheless &c.

*Third Count.* After referring to the covenant as before set forth, the plaintiffs averred, that after the execution of the said covenant, to wit, on the 20th December, last above mentioned, that of good merchantable materials, by them furnished, they did construct, make, fit and put up, in a good, faithful, and workman-like manner, for the said *Charles Crook, Jr. and brothers*, a high pressure steam engine of thirty horse power, to work at a pressure of forty-five pounds to the inch, with a cast iron cylinder, with three boilers of iron, a quarter of an inch thick, to be nineteen feet long, and thirty-six inches in diameter, and a flue proportioned thereto, and delivered the same at the factory of the said defendants, in the city of Baltimore, and there properly fitted up, and put the same into full and effective operation, at the proper expense and charge of the said *Watchman and Bratt*. And the said plaintiffs also say, that although the term of twelve months had fully expired and ended, after the said engine and appurtenances had as aforesaid been fitted up and put into full and effective



operation, and before the commencement of this action. Nevertheless &c.

*Fourth Count.* After referring to the covenant as before set forth, the plaintiffs averred, that after the making of the said covenant, they did make, construct, fit and put up, the steam engine therein mentioned, at the factory of the said defendants, in the city of *Baltimore*, and did put the said steam engine into full and effective operation for the said defendants, on the twentieth day of December, in the year eighteen hundred and twenty-five, at the factory aforesaid, to the full intent and meaning of the said covenant, to wit, at the county aforesaid. By reason whereof the said plaintiffs say, that after the expiration of twelve months from the time the said engine was put in full and effective operation as aforesaid, they became entitled to have of the said defendants, and the said defendants were obliged to pay them, the aforesaid three instalments, at six, nine and twelve months, amounting to the sum of twenty-five hundred dollars. And although the said term of twelve months above mentioned, had fully expired and ended, before this action was commenced, yet the said defendants have not paid to the said plaintiffs, the said sum of twenty-five hundred dollars, nor any part thereof, and so have broken their covenant aforesaid. And therefore the said plaintiffs say they have sustained damage in the sum of five thousand dollars, &c.

The defendants demurred generally to the first and second counts; and the plaintiffs joined in the demurrer. The defendants pleaded to the third and fourth counts as follows.

*First plea to 3d and 4th counts.* And as to the two last counts in the said declaration contained, the said defendants say, that the said plaintiffs ought not, &c. because they say, that the said plaintiffs did not furnish good merchantable materials, and construct, make, fit and put up, in good and faithful workman-like manner, for the said *Charles Crook, Jr.* and *brothers*, the said defendants, a high pressure steam engine, of thirty horse power, to work at a pressure of forty five pounds to the inch, with a cast iron cylinder, with three

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boilers of iron, a quarter of an inch thick, nineteen feet long, thirty-six inches diameter, and a flue proportioned thereto, and put the same into full and effective operation at the factory of the said *Charles Crook Jr. and brothers*, by and at the proper expense and charge of the said *Watchman and Bratt*, within ninety days after the execution of the articles of agreement above mentioned, and this they are ready to verify. Wherefore they pray judgment, &c.

*Second Plea to 3d and 4th Counts.* And the said defendants, as to the said two last counts in the said declaration contained, for further plea thereto, &c. because they say, that although true it is, that the said plaintiffs did deliver and set up certain parts of a steam engine at the factory of the said defendants, yet the said plaintiffs never did deliver a fly wheel, crank, or shaft; and the said defendants aver, that a fly wheel, crank and shaft are necessary and indispensable parts of a steam engine, without which the residue is of no use or benefit in spinning cotton. And so the said defendants say, that the said plaintiffs did not make, construct, fit and put up the steam engine in the article of agreement mentioned, in manner and form as in the said two last counts in the said declaration, they have averred; and this they, the said defendants are ready to verify. Wherefore they pray judgment, &c.

*Rejoinder to defendants' 1st Plea to 3d and 4th Counts.* And the said plaintiffs, as to the first plea by the said defendants above pleaded, to the said third and fourth counts of the said declaration, say that they ought not to be precluded thereby, because they say, that they did furnish good merchantable materials, and construct, make, fit, and put up, in a good, faithful and workman-like manner, for the said defendants, a high pressure steam engine of thirty horse power, to work at a pressure of forty-five pounds to the inch, with a cast iron cylinder, with three boilers of iron a quarter of an inch thick, nineteen feet long, thirty-six inches diameter, and a flue proportioned thereto; and put the same into full and effective operation at the factory of the

said defendants, at the expense and charge of the said plaintiffs, on the twentieth day of December, in the year eighteen hundred and twenty-five, to wit, at the county aforesaid, &c. and therefore, &c.

*Rejoinder to defendants' 2nd Plea to 3d and 4th counts.* And the said plaintiffs as to the second plea of the said defendants to the third and fourth counts of the said declaration, say, that they ought not to be barred from, &c. because they say, that they did deliver a fly wheel, crank and shaft, with the said steam engine; and of this they put themselves upon the country, and so forth. And the said defendants by their said attorneys, in like manner, &c.

The defendants then demurred generally to plaintiffs' rejoinder to the 1st plea to the 3d and 4th counts, and joined issue upon the rejoinder to second plea to same counts. The county court rendered judgment upon all the demurrers for the defendants, and the plaintiffs appealed to this court.

The casue came on to be argued before BUCHANAN, Ch. J., and EARLE, STEPHEN, and DORSEY, J.

*Gill*, for the appellant, contended.

1. That the first breach in the first count of the declaration, contains an averment of a sufficient and substantial performance of the plaintiffs' part of the covenant, to enable them to recover the instalments of \$2500.

In support to the first breach, he cited 1 *Saund.* 320, 481. note 4. *Terry vs. Duntze*, 2 *Hen. Black.* 389. 1 *Saund.* 319. *Heard vs. Wadham*, 1 *East. Rep.* 625, 631. *Seers vs. Fowler*, 2 *Johns. Rep.* 272. *Wilcox vs. Ten. Eyck*, 5 *Johns.* 78. *Carpenter vs. Creswell*, 15 *Serg. and Low.* 22. *Gardiner vs. Corson*, 15 *Mass.* 501. *Ib.* 503. *Harper vs. Hampton*, 1 *Harr. and Johns.* 672. He insisted that *time* was not of the essence of the contract. He referred also in support of this count to *Duke of St. Albans vs. Shore*, 1 *Hen. Black.* 273. 2 *Harr. and Johns.* 466. *Benson vs. Hubbs*, 4 *Ib.* 286.

2. That the exception, as stated in said breach of the materials furnished in the construction of the engine, does not diminish in point of law, the performance of the covenant as to furnishing materials, relied on and pleaded. That it forms a case, if at all objectionable, for the defendant to recover damages upon, but cannot defeat the action. *Terry vs. Duntze*, 2 *Hen. Black.* 389. 1 *Chitty Pl.* 317, 318. *Rawson vs. Johnson*, 1 *East.* 206, 208, 211. *Waterhouse vs. Skinner*, 2 *Bos. and Pul.* 447. *Robbins vs. Luce*, 4 *Mass. Rep.* 475. *Couch vs. Ingersoll*, 2 *Pick. Rep.* 302. *Hotham vs. East India Co.* 1 *Term. Rep.* 638. *McElderry vs. Flannigan*, 1 *Harr. and Gill*, 323. *Wills. Rep.* 496.

3. That the agreement to finish the engine within ninety days is not of the essence of this contract, and does not make a condition precedent.

4. That the defendants' covenant to pay the \$2500 in instalments, after the engine should have been put into full and effective operation, does not relate to the *time* of its being put into operation, but to the *fact* of its being put into full and effective operation.

5. That the only conditions precedent, if there be any, to the payment of the \$2500, were the fact of the engine being put into full and effective operation, and the lapse of six, nine, and twelve months thereafter.

Upon the 2d breach in the first count, he contended.

6. That if the ninety days mentioned in the covenant, be a condition precedent, yet the fact that the plaintiffs were ready, and prepared to put the said engine into effective operation within the ninety days, and were prevented by the defendants, gives the plaintiffs a right to the \$2500 after the lapse of twelve months from such readiness.

7. Upon the breach as laid in the second count he insisted, that the ninety days constituted no condition precedent. That the hindrance within that time by the defendants as averred, and the actual putting up the engine according to



the covenant, gave a right after the lapse of the twelve months, to the \$2500.

8. The defendants cannot, and ought not to rely upon the engine not being put up within the ninety days, without first showing, that they, within that time, did their part of what was necessary to its being put into operation, viz: providing the brick and stone work.

9. That those breaches, in which it appears that the appellants were prevented from performing their covenant to the day by the default of the appellees, are to be considered as equivalent to performance by the appellants. In support to the second count he cited, 1 *Chitty Pl.* 76. *Heard vs. Wadham*, 1 *East.* 630. *Jewell vs. Schroepell*, 4 *Cowen*, 564. *Littler vs. Holland*, 3 *Durn. and East.* 590. *Brown vs. Goodman*, 3 *Term. Rep.* 592, (note.) *Phillips vs. Rose*, 8 *Johns. Rep.* 392. 15 *Ib.* 304. *Freeman vs. Adams*, 9 *Johns. Rep.* 114.

Upon the 3d and 4th counts, he referred to *Boone vs. Iyre*, 1 *Hen. Black.* 273, (note.) *Terry vs. Duntze*, 2 *Hen. Black.* 389. *Ritchie vs. Atkinson*, 10 *East.* 295. *Ib.* 300. *Ib.* 302. *Ib.* 311. *Havelock vs. Geddes*, 555. *Ib.* 563.

*Johnson and Evans*, for the appellees.

1. The covenant of the defendants to pay the last instalment of \$2,500, is dependent on the plaintiffs' finishing and putting up the engine, within the ninety days. The rule by which covenants are decided to be dependent, or the reverse, is, that the intention of the parties, as displayed upon the face of the contract, shall govern; and the precedency of acts depends upon the order of time, in which they are to be performed. *Speake vs. Sheppard*, 6 *Harr. and Johns.* 85. *Thorpe vs. Thorpe*, 1 *Salk.* 171. 1 *Ld. Raymond*, 665. 1 *Wheat. Selw.* 98. *Campbell vs. Jones*, 6 *Term. Rep.* 572. 1 *Saund.* 320, note 4. When the covenants go to the whole consideration on both sides, they are dependent. 1 *Ventris*, 147. *Duke of St. Albans vs. Shore*, 1 *H. Black.* 270—and the plaintiff must show a

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substantial performance of the agreement on his part, before he can maintain an action. *Carpenter vs. Creswell*, 15 *Serg. and Lowb.* 22. *Gardiner vs. Corson*, 15 *Mass. Rep.* 504. And even the performance of a substantial part, will not be sufficient, unless the things to be done are *divisible*. *Ritchie vs. Atkinson*, 10 *East.* 308. *Watkins vs. Hodges & Lansdale*, 6 *Harr. and Johns.* 38. The same contract may contain covenants, dependent, independent, and mutual. *Gardiner vs. Corson*, 15 *Mass. Rep.* 500. *Stoner vs. Gordon, et al.* 3 *Maul. and Selw.* 308. *Webster vs. Warren*, 2 *Wash. C. C. R.* 456.

In this case, the covenants are, 1st, that a certain sum should be paid weekly, as the work progressed,—2d, that when the work should be finished, the balance of the sum of \$1200 was to be paid,—and 3d, that the balance of the \$3700 (the whole price) should be paid by instalments, of six, nine, and twelve months, from the actual completion of the work. This balance, according to the contract, was to be \$2500. Now, compel the defendants to pay it before the completion of the work, and the credit of six, nine, and twelve months is expunged from the contract; or if the work should be retarded, and the weekly payments should amount to more than \$1200, then the terms of the contract are changed to the disadvantage of the defendants.

In the case of *Terry vs. Duntze*, 2 *H. Black*, 389, the whole of the sum to be paid, *might have become* due before the work was completed, because there was a stipulation to pay certain weekly wages to the plaintiffs, and these wages *might* have amounted to more than the sum to be paid. But in the case under discussion, the weekly payments were in no event, to be paid out of the last instalment, which could not become due until the end of certain stipulated periods from the final completion of the work. *Cunningham vs. Morell*, 10 *Johns. Rep.* 203. *Harper vs. Hampton*, 1 *Harr. and Johns.* 672. If the rule supposed to be established by *Terry vs. Duntze*, applies to this case, then the defendants could be made to pay the *whole* sum before

the work was even commenced, that being the necessary result of considering the covenants independent. It is said, however, that the covenant to pay, is in consideration of performance of a *part only* of the covenant to perform. But if this be so, then the defendants could be made to pay the whole, as soon as the work was commenced. This cannot be the case—performance is certainly necessary, and being necessary, the question is, is *time* a material part of the performance?

Suppose the plaintiffs had not completed the engine by the time agreed on, but in their declaration had averred a completion by a subsequent day, and that defendants had refused to receive it, the action would certainly have failed. *Watkins vs. Hodges and Lansdale*, 6 *Harr. and Johns*. 38.

2. Does the subsequent acceptance of the engine, authorize the plaintiffs to recover the price, under *the covenant*? Now if time is *material*, a parol agreement to dispense with it, no more authorizes a recovery *upon the covenant*, than would a parol agreement to dispense with any other part of the covenant. However the acceptance of the engine by the defendants, after the time stipulated, may have subjected them to an action in another form, for the value of the work, still, they are not liable on the covenant. *White vs. Parkin*, 12 *East*. 583. *Smith vs. Wilson*, 8 *East*. 436. *Thompson vs. Brown*, 7 *Taunt.* 656. *Little vs. Holland*, 3 *Term. Rep.* 592. 4 *Taunt.* 745. *Jewell vs. Schroepell*, 4 *Cowen*, 564. 7 *Pick. Rep.* 181. *Smith vs. First Cong. Meeting House*, 8 *Pick. Rep.* 178. *Abbott on ships*, 329. *Caze & Richaud vs. Balt. Ins. Co.* 7 *Cranch.* 358. *Hamilton vs. Warfield*, 2 *Gill and Johns*. 482.

3. The 2d breach in the 1st count, and the 2d count, do not aver sufficiently, that the plaintiffs were prevented by the defendants from performing the contract on their part. 1 *Chitty Pl.* 323. *Bach vs. Owen*, 5 *Term Rep.* 409.

It was the duty of the plaintiffs, *first* to prepare the boilers, before they could call on the defendants to do the brick work, for the brick work was required to put up the boil-



ers, and consequently, the defendants should have *notice* that the boilers were ready. Suppose the plaintiffs had not prepared the boilers in time, the defendants would not have been liable for a failure to do the brick work. The defendants were not bound to take notice of the progress made in the work. The obligation to pay weekly had no reference to the value of the work done. There is no averment of an actual delivery, but a readiness to deliver; nor does the excuse go to the delivery, but to the engine as set up.

*Taney*, (Att'y Genl. U. S.) in reply.

1. The covenants are independent, and performance by the plaintiffs, not a condition precedent to the payment of the money.

2. If the covenants are dependent, still, time in this agreement is not essential.

3. If, however, time is a material part of this contract, still as the substantial part of the covenant has been performed, a failure as to time merely, is not fatal to the action.

4. If all these points are against the plaintiffs, still a sufficient excuse is alleged, for the failure on their part, and the action consequently can be maintained.

1. When the *entire* consideration is to be paid, when the *entire* work is done, and no part while it is in progress, then the doing the work by the time limited, is a condition precedent; but if part of the compensation is to be paid before performance, the covenants are independent. In *Watkins vs. Hodges and Landsdale*, 6 Harr. and Johns. 38, the whole of the tobacco was to be delivered by a given day, which was before any part of the purchase money was to be paid.

The question is, whether the covenant is within the case of *Terry and Duntze*, and whether that case is law? That case was not decided upon the ground, that the entire consideration might be paid before the entire work was done, but distinctly upon the ground, that if a part was to be paid, the covenants are independent—and in such a case the parties are supposed to rely reciprocally upon the covenants of each



other. The case at bar is clearly within the rule of *Terry and Duntze*, because a certain sum is stipulated to be paid weekly as the work progressed. Being within the rule, the next question is, is there any thing in it which should induce the court to change it? In the case 10 *Johns.* the rule was changed, but that was a case in which *no work* had been performed. Again—for the recovery of the weekly payments, the plaintiffs must sue in covenant, and if therefore for the balance, they are to sue in *assumpsit*, you divide the remedy, and compel them to bring two actions instead of one, and according to this interpretation, the credit stipulated for is gone, because as soon as the engine was put up, and accepted, though the day after the day named in the agreement, the plaintiffs could bring their action. Besides, if *covenant* cannot be maintained by the plaintiffs for the money, their warranty that the engine should remain in good order for a certain period is discharged.

The authority of the case of *Terry and Duntze*, is recognized in the following cases:—*Heard vs. Wadham*, 1 *East*, 625. *Ib.* 631. *Seers vs. Fowler*, 2 *Johns. Rep.* 272. *Ib.* 387. *Wilcox vs. Ten. Eyck*, 5 *Johns.* 78. *Gardiner vs. Corson*, 15 *Mass. Rep.* 500. *Reab vs. Moore*, 19 *Johns. Rep.* 341. *Webster vs. Warren*, 2 *Wash. C. C. R.* 456.

2. But if the covenants are dependent, *sill time* is not essential. The defendants' covenants are not dependent as to time, but upon the making and putting up the engine. *Cunnigham vs. Morell*, 10 *Johns.* 214.

If the last instalment was to be paid in certain periodical payments, after the ninety days, the time named for putting the engine into full and effective operation, why does the contract say, that the instalments are to be paid at stipulated periods, after the completion of the work, instead of fixing the credit from the end of the ninety days? It is plain, from this stipulation, that the credit was to run from the completion of the work, and not from the expiration of the ninety days, and it could not therefore have been intended to oblige the plaintiffs to finish the work within the time, or to make time a part of the condition precedent.

3. A substantial part of the contract having been performed by the plaintiffs, within the time, they are entitled to recover, though a small part was not so performed. The case of *Boone & Iyre*, decides that, a contract divisible in its nature, need only to be performed in part, to enable the party performing to recover; nor is there any thing in *Hamilton vs. Warfield*, 2 *Gill and Johns*. 482, against this proposition, because there the condition was indivisible. In support of this proposition, he referred to *Havelock vs. Geddes*, 10 *East*. 555. *Carpenter vs. Creswell*, 15 *Serg. and Low*. 22. 6 *Durn. and East*. 570.

4. The excuse, for the failure on the part of the plaintiffs to perform their contract, is sufficient. The question here is, should the plaintiffs have averred *notice* of their readiness? When concurrent acts are to be done, it is not necessary to aver notice. Notice is only necessary, when knowledge is in possession of but one party; but here the acts to be done were concurrent, the putting up the engine, and preparing the brick and stone work, being to be done, at the same time. In such a case, the averment of *readiness* is sufficient. Notice need not be averred, because the contract itself gave the defendants notice, that they must have the work ready a reasonable time before the end of the ninety days, and it was their duty to know, what would be a reasonable time. 2 *Saund*. 694, (*note 3.*)

STEPHEN, J. delivered the opinion of the court.

This suit was instituted upon a covenant, entered into between the parties on the 12th of September, 1825; and after referring to the pleadings, the judge said—the question which arises in this case, is upon the true construction and character of the covenants contained in the deed, or instrument of writing upon which this suit was instituted. We may say *in limine*, that whatever may have been the principles contained in the more ancient decisions, upon the legal effect and operation of contracts of a similar description, the strong leaning of the courts

in more modern times, has been to disencumber themselves from the fetters of technical rules, and to give such a rational interpretation to the contract as will carry the intention of the parties into full and complete operation. In 8th Term. Rep. 371, *Grose*, Justice says, "the question is, whether these covenants be dependent or independent, and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on this subject, some of the older cases leaning to construe covenants of this sort to be independent, contrary to the real sense of the parties, and the true justice of the case. But the later authorities convey more just sentiments, and the case of *Kingston vs. Preston*, was the first strong authority in which they prevailed in opposition to the former." In this case of *Kingston vs. Preston*, *Ld. Mansfield* says, "that the dependence or independence of covenants, was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Alluding to the case of *Kingston vs. Preston*, in a subsequent part of his opinion, Mr. Justice *Grose* says, "I have since found, that that was not the first case, where those sentiments began to be entertained; for it appears from a late publication of reports from the manuscript of *Ld. Chief Justice Willes*, that in a case of *Thomas vs. Cadwalader*, *Willes Rep.* 496, his lordship noticed the injurious tendency of the doctrine, which had before that time prevailed in those cases, and seemed very desirous, that the governing rule should be so to construe such covenants, as that the real intention of the parties should be carried into effect, to obtain the true justice of the case. This was afterwards done in the case of *Kings-ton vs. Preston*, and that has since been settled to be the rule in many cases." Mr. Justice *Grose* then concludes his opinion by observing, that "the intention of the parties is, or is assumed to be, the governing principle of all the

late determinations.” In the same case, Mr. *Justice Lawrence* observes, “whatever the form of words may be, if we can collect from the face of the instrument, that the whole was to be performed by the plaintiff before the money was to be paid, nothing short of the performance of the whole can enable him to sustain this action for the money.” So, in the same case, *Ld. Kenyon*, speaking of the cases which had been cited in the argument, says, “the general rule which governs them all is, that every man’s agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument.” A similar principle is laid down in 6 *Term. Rep.* 669, where *Ld. Kenyon* says, “it has been frequently said, and common sense seems to justify it, that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument, and that technical words, (if there be any to encounter such intention, and there are none in this case) should give way to that intention.” According to these authorities, the important inquiry in this case is, what was the intention of the parties to be collected from the covenant entered into between them. It appears by the pleadings in the cause, that the plaintiffs, for the consideration therein mentioned, agreed with the defendants that they would furnish the materials, and construct, make, fit, and put up in a good, faithful and workmanlike manner, a high pressure steam engine of a particular description, the whole to be finished and delivered at the factory of the defendants, and there properly fitted up, and put into effective operation, by, and at the proper expense and charge of the plaintiffs, within ninety days from the day of the date of the said agreement; *in consideration whereof*, (that is, in consideration that the plaintiffs would perform their part of the contract, by making and putting up the engine as stipulated;) the defendants bound themselves to pay the sum of thirty-five hundred dollars *for the said engine, so as aforesaid to be constructed, made, and put up* in the following



proportions, to wit; to pay the sum of \$100 each week as the work progressed, until the same *should be finished, and put up as aforesaid*, when the sum of twelve hundred dollars, *including* the weekly advances aforesaid, was to be paid. The residue of the consideration, that is to say, twenty-five hundred dollars, was to be paid in three equal instalments, at six, nine, and twelve months, from and after the said engine should have been put into full and effective operation, to the *full extent* and meaning of said covenant; and the defendants covenanted, that they would provide and pay for the brick and stone work, necessary for the putting up the boilers aforesaid, and likewise pay for the brick and stone; and the plaintiffs agreed to warrant and insure the faithful performance of the said engine, for the term of twelve months from time it should be put into operation as aforesaid. Upon the true construction of this contract, was it the understanding of the parties that the engine was to be completed in ninety days, as a condition precedent to the payment of the three last instalments, amounting to the sum of twenty-five hundred dollars? In the first place, it is to be observed, that the parties contemplated the completion of the engine, before the weekly payments would amount to the sum of twelve hundred dollars, because those payments were to be deducted from that sum; and the *balance* to be paid when the work should *be finished*, and put up according to contract, or to use the language of the deed of covenant, “*should be finished, and put up as aforesaid.*” If then, it was the evident intent and meaning of the parties, that the engine should be completed, and put up before the weekly payments would amount to the sum of twelve hundred dollars; it is demonstrably clear, that the time limited for the completion of the work was of the essence of the contract, and that the plaintiffs were not entitled to recover the twenty-five hundred dollars under the covenant upon which their action was founded, because those instalments were not to be paid until “after the said engine should have been put into ful

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and effective operation, to the *full extent* and *meaning* of said covenant," which, upon every principle of correct interpretation, would seem to require a rigid compliance with the stipulations of the contract, as well in relation to the time fixed on, as to the other particulars; the words used being sufficiently strong, and comprehensive to indicate such to have been the sense and meaning of the parties. That time was of importance in the contemplation of the parties, and formed a material ingredient in the constitution of their contract, further appears from that part of it, by which the plaintiff's covenant to "warrant and insure the faithful performance of the said engine, for the term of twelve months, from the time it should be put into operation as aforesaid." Nor do we think that the failure to complete the engine by the time limited, is excused by the non-performance of the defendants of their covenant, by which they bind themselves, "to provide, and pay for the brick and stone work, necessary for putting up the boilers aforesaid, and likewise pay for the brick and stone," because it was not necessary to do that part of the work, before the boilers would be in a state of readiness to be put up; of which fact, it was the duty of the plaintiffs to inform the defendants in due and proper time, as they best knew when such part of the work would be wanted; and until it should become necessary, it was not the duty of the defendants to do an act which might ultimately prove to be vain and nugatory. In this case, the words in "consideration whereof," must we think be construed to refer, not to the promise or undertaking of the plaintiffs to do the work, but to the actual performance of the thing stipulated to be done; for in 4 *Term. Rep.* 764, *Ld. Kenyon* was of opinion, that the words "in consideration of the premises," meant in consideration of the actual transfer of the stock, and not in consideration of the covenant to transfer. So, in 1 *Tidd's Prac.* 442, it is said, "the words by which conditions precedent are commonly created, are, for and in consideration of *ita quod proinde*," &c. A by his

agreement was to complete a certain piece of road, on or before the 26th of October, 1810, and B covenanted to pay him for completing the whole of the work, \$6000, to be paid in instalments as the work progressed. It was held that A could not maintain an action for the whole consideration money, without averring, and proving a performance of the whole work, and that if he brought his action for a rateable part of the money, he must show a rateable performance. The above case may be found in 10 *Johns.* 203, *Cunningham and another vs. Morrell*, where Chief Justice Kent delivered the following very sensible and learned opinion, in which he seemed to think that in the case of *Terry vs. Duntze*, the court pushed the doctrine of mutual and independent covenants too far. He says, "we cannot distinguish this case so as to take it out of the operation of the case of *Sears and Fowler*, and *Havens vs. Bush*, 2 *Johns. Rep.* 272, 387. Those cases were governed by the English decision in *Terry vs. Duntze*, 2 *Hen. Black.* 380. But from a more full consideration of the subject, we are now led to believe, that the court of C. B. carried too far, the principle of mutual and independent covenants. It is true, that if by the terms of the contract, the money is to be paid by a day certain, and which is to happen before the performance of the service, or by a day certain, and there is no day certain for the performance, the performance is not a condition precedent, and the party may sue for the money without averring or showing performance. This is what was said by *Ld. Holt* in the case of *Thorpe vs. Thorpe*, 12 *Mod.* 455. 1 *Ld. Raymond*, 662. And he went no further with the doctrine of mutual covenants. Where it be repugnant to the contract to make the service a condition precedent, the parties, he observes, are left to mutual remedies, on which by the express words of the agreement they have depended. The cases which he cites of *Pool vs. Tolchesser*, 48 *Edward*, 111, 2, 3, and *Pordage vs. Cole*, 1 *Saund.* 319, are to this effect, and in both of them, the entire consideration was to be paid by a fixed time, and

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which might precede the service. *Ld. Holt* further said in that case, "what is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he makes a bargain and relies on the other's covenant, or promise to have, what he would have done to him, it is his own fault. If the agreement be that A shall have the horse of B, and A agree that B shall have his money, they may make it so, and there needs no averment of performance to maintain an action on either side; but if it appear by the agreement, that the plain intent of either party was to have the thing to be done to him, performed, before his doing what he undertakes of his side, it must then be averred. After this rational explanation of the rule, we cannot but think it was misapplied, or carried to an unreasonable length in *Terry vs. Duntze*. The covenant in that case was, that the plaintiff should finish the building by a given day, and the defendant was to pay the consideration by instalments as the building should proceed, and according to a certain and specified state of advancement, and the remaining part of the consideration when the building should be completed; but because two several sums of money were to be paid before the whole was performed, and when only a part of the service was performed, the court held the covenants to be independent, and as we understand the case, and as the reporter understood it, that the plaintiff might maintain his action for the entire consideration, without any averment of performance. This was contrary to the plain understanding of the parties, and was not warranted by any of the cases referred to. It was sufficient for the plaintiff to have shown the advance of the building as stipulated, to have entitled him to the instalment then to be paid, but to have entitled himself to the last instalment, he was bound to aver, and show a completion of the contract. The good sense and justice of the case, as it appears to us, required this construction, and the meaning of the parties could not have been mistaken. The error in that case, and in the



two cases in this court which followed it, consisted in holding the covenants to be independent throughout, because a part of the consideration money was to be paid before the entire service was to be performed. This might have been the case, if the contract in all those cases had not provided that a certain part of the consideration was to be paid on the completion of the service, and which rendered the service *pro tanto*, a condition precedent. There is nothing unreasonable nor unusual in such an agreement. It has been the constant language of the *English* courts, that the dependence or independence of the covenants, depended on the good sense and meaning of the contract. Their precedency, said *Ld. Mansfield*, must depend on the order of time, in which the intent of the transaction requires their performance. A mechanic generally stands in need of advances from time to time, in aiding him to procure the materials to carry on his work, and the employer if prudent will generally reserve a considerable payment until the work be completed, and to depend on such completion. But if all these payments can be demanded without performance, merely because a part of them were to be made as the work advanced, it would be making the intention of the parties subservient to technical rules. The parties have an undoubted right, if they please, to make their covenants dependent or independent throughout, or to make the covenants independent as to one payment, and dependent as to another. They have a right to mould their contracts so as to suit their mutual convenience and interests, and when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful. For these reasons, I apprehend that we have yielded with too much deference to the decision in *Terry vs. Duntze*, and did not sufficiently advert to the evil consequences of the doctrine in the extent there laid down. It becomes then our duty to limit the operation of that case, and of the two cases in this court which were founded upon it, so as to better to

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fulfil the intention of the contract, and the justice of the case ; and in doing this, we may be permitted to consider it as some apology for those decisions, that we at the time reposed on the authority of so respectable a tribunal as the *C. B.*; and especially when its decision was supported by so distinguished a judge as *Buller*, who was equally eminent for a clear and sound judgment, and for diligent and profound inquiry.

“Having thus freed ourselves from undue embarrassment in considering the real merits of this case, we say, that as the road was to be completed on or before the 20th of October, 1810, and as the defendant was to pay therefore the sum of \$6000, to be paid on or before that day, in instalments as the work progressed, the just construction of the contract is, that if the plaintiffs will go for the whole consideration money, they are bound to aver, and show a performance of the whole work, and if they go for a rateable part of the money, they are bound to show a rateable performance.” We have extracted thus largely from the opinion of that eminent jurist, Chief Justice *Kent*, because we think it supported, not only by correct legal principles, but by the plainest dictates of common sense, and because it goes far to rescue the law, which ought to be considered a rational science, from the imputation of gross injustice and palpable absurdity. One other decision only, and that of modern date, and made in one of our sister States by a very learned and distinguished tribunal, will be referred to. It will be found in 8 *Mass. Rep.* 80. In that case, *Parker*, Ch. J., in delivering the opinion of the court, also adverts to the case of *Terry vs. Duntze*, and uses the following strong expressions: “In one case of modern date, it was decided, that if a man covenants to work upon a house, and the owner covenants to pay him by instalments, and that the last instalment shall be paid when the house is finished, the workman may recover the last instalment, whether the house shall be finished or not. This seems to be turning a man’s contract into something totally different from his words

and intentions in the contract; and yet in the same book it is said, that the intent of the parties is to govern in the construction of the covenants. The principal reason given for this decision is, that some of the instalments were to be paid before the house was finished. But because a man had engaged to pay one certain sum of money before his house was finished, therefore, he should be held to pay another sum, which he had not engaged to pay, until his house should be finished, seems to be very questionable as a logical, whatever it may be as a legal conclusion." The cases of *Goodesson vs. Munn*, 4 D. and East. 61. *Campbell vs. Jones*, cited in the argument; *Glazebrook vs. Woodrow*, 8 D. and East, 366; and *Heard vs. Wadham*, 1 East. 619, all show a disposition on the part of the judges, to break through the bonds which some old cases had imposed upon them, and to adopt what *Ld. Kenyon*, in one of the cases calls the common sense doctrine—that the true intent of the parties, as apparent in the instrument, should determine whether covenants or promises are independent, or conditional, instead of any technical rules of which the parties were totally ignorant, and the application of which, would in most cases utterly defeat their intentions. We think therefore, that the plaintiffs were not entitled to recover the money sued for by them, upon the true construction of the covenants entered into by them. Whether they had not their remedy in a different form of action, is another question. If after the work was done, though not pursuant to the contract, the party for whom it was done, accepted it, it would seem right and proper, that he should pay for it, what it was worth. This we think, justice would require, and it is believed, that the principles of law do not forbid it. To this effect the law is stated to be in 4 *Cowen's Rep.* 564. It is there said, that "if there be a special agreement under seal to do work, and it be done, but not pursuant to the agreement, either in point of time, or in any other respect, the party who did the work may recover upon the common counts in *assumpsit*, for the work and labor, if the work be

accepted by the party for whom it was done. The workman cannot maintain covenant, unless he perform the work strictly within the time. By permitting the plaintiffs, after knowing that the work was not completed in time, to proceed and finish it, he waived all right to object on that ground, and the law implies a promise on his part, to pay what the labor was reasonably worth." So, in *Burn vs. Miller*, 4 Taunt. Rep. 745, we find the same principle recognized. "A lessor contracted to pay his tenant, at a valuation for certain erections, pursuant to a plan to be agreed on, provided they were completed in two months. No plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work, and held that the lessee might recover as for work and labor, on an implied promise, arising out of so many of the facts, as were applicable to the new agreement." In this case the court say, "It is a settled rule, even in case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an implied *assumpsit*. Upon this ground it is, that freight is daily recovered in actions of *assumpsit*, on implied promises substituted for the charter parties by deed. And here, though the plaintiff cannot put his case upon the written agreement, he may upon the agreement raised upon so many of the facts of the case, as are applicable." Upon the whole, we are of opinion, that the judgment of the court below was correct, and that the same ought to be affirmed.

JUDGMENT AFFIRMED.

*Gill*, for the appellants, after the affirmance of the above judgment, moved for a *procedendo*, upon the following grounds.

The 10th sec. of the act of 1826, ch. 200, declares, that upon any appeal, or writ of error, the Court of Appeals, shall give judgment, or award a *procedendo*, for a rehearing



of the case, as shall appear to be just. Prior to this law, and by the act of 1806, *ch.* 90, *sec.* 1, the right to award a *procedendo* depended upon the reversal of the judgment of the county court. The act of 1826 establishes a different, and more liberal rule. It submits the subject to the sound discretion of the court, to its moral jurisdiction, and directs, that the *procedendo* shall be awarded, when there is evidence in the record, either by facts, or pleading, that the plaintiff has a just claim. In this case, it is apparent, from the record, that the defendants have had the substantial benefits of the contract, and have not paid for them.

Under the act of 1826, the court is not trammelled by technical restraints of any sort, and it may be fairly inferred, that the legislature designed to give a re-hearing, in connexion with the right to amend the pleadings, to the same extent as before had been awarded upon bills of exception, where the judgment of the county court had been reversed. This qualification of a right to the *procedendo*, is a very fair one. It aids just claims, and provides against accidents and errors growing out of nice questions of pleading. The claim being a just one, the defendant has no right to complain.

If the cause is transmitted to the county court, with leave to amend the pleadings, the plaintiffs could put it in a situation to recover. They could aver an excuse, in proper, and technical form, for a non-delivery of the engine in full and effective operation at *Crook's* factory, within ninety days. It could be averred, that after the execution of the contract, and before the expiration of the ninety days, the plaintiffs gave the defendants notice, at their factory, that they, the plaintiffs, were ready, prepared, and willing to put up the said engine, and put the same into operation, and that they requested the defendants to furnish the brick and stone work, a sufficient period before the expiration of the ninety days, to have enabled the plaintiffs to put up, and put the said engine into operation at the said factory within said ninety days, but that the defendants did not, and would not furnish the brick and stone work in season.

The second breach of the first *count* avers, that the plaintiffs were ready and prepared to deliver and properly put up the engine at the factory of the defendants, and to put the same into full and effective operation, on the 11th of December, 1825, but the defendants did not provide the brick and stone work necessary for putting up the boilers, by reason whereof the engine could not be put up on the day, and the plaintiffs were thereby prevented from putting up the engine. To this breach there was a *general demurrer*. The state of the pleadings then admit :

1. That the plaintiffs commenced the engine. 2. That they were ready within the ninety days, to put it up at the factory. 3. That the defendants did not furnish the brick work. 4. That the failure to furnish the stone work, prevented the putting up the engine.

Now, these facts show, that the greater part of the work must have been completed, and that the plaintiffs had nearly earned their whole claim, even supposing defendants had furnished the brick work, and that the defendant must have received *some* notice to furnish the brick work. The plaintiffs, therefore, having in substance, performed their contract, they are entitled, under the act of assembly, to a new trial.

The county court had several times, before the institution of this suit, decided the broad principle, that *time* was not of the essence of a sealed contract. In *Finley vs. Boehme*, 3 *Gill and Johns*. 42, that point was directly so decided by that court. These decisions induced the counsel not to bring *assumpsit*.

*Johnson, contra.*

Independent of the act of 1830, *ch.* 186, an act not referred to by the appellants, no provision can be found, and no case decided, to authorize a *procedendo*, when the judgment appealed from is *affirmed*. Had it been otherwise, there would have been no necessity for the act of 1830. The passage of that act is evidence, if any were needed, that a *procedendo*, in case of affirmance, was before wholly unprovided for ; and the act of 1830 applies only to bills of

exceptions, and of course not to a case like the present. But if the court was now, for the first time, called upon to act under the law of 1826, it is confidently contended, that the present motion could not be granted. In this case, as in all others, the court can alone look to the record, and to what it discloses. That the plaintiff has a better case than his pleadings disclose, can only be known by facts appearing in exceptions, or in other parts of the record. When that is *not* the case, the court can have no knowledge that the case as made by the plaintiff, is not the *only case that he can make*, and of course, can have no knowledge that justice requires a new trial. In the present instance, the only ground upon which it can be pretended, that the plaintiffs could recover on this covenant, is by supposing a fact to exist, of which no evidence is offered in any part of the record. The court therefore, cannot see that justice requires a new trial.

The only ground on which it is contended that a *procedendo* should issue, in this case, is the *suggestion* of the appellants' counsel, that he believes the fact will enable him to make a better case, than is now presented by the record. It will not escape the observation of the court, that the case of the appellants was brought out in pleading in every variety of form, and that no application was made to the court below to amend, for the purpose of pleading the fact now alleged to exist, and which if it does exist, must have been then known to their counsel. That excuse was deemed by them to be necessary to account for the delay in the completion of the engine is obvious, because the pleadings aver an excuse in different ways. Under such circumstances, to subject the successful party below, to the expense and trouble of a new trial, would be a principle decidedly wrong, and in practice extremely pernicious. Should the precedent be established, it will be difficult to imagine a case, in which the judgment of the Court of Appeals, will *practically terminate the suit*. This, it will be observed, is not a case in which *from the record*, the court can see that the

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appellants have a better case, than is technically presented, and which is lost to them, from want of mere *technical form*; but on the contrary, one, in which as far as *the court have* or can have any *judicial* knowledge, the appellants are neither legally nor equitably entitled to recover. To go out of the record, and listen to the mere suggestions of the parties, or their counsel, as to the case they will be enabled to present, if an opportunity is given them, is not, cannot be, the duty of the court. No instance can be found, in which even in a court of original jurisdiction, a new trial has been awarded, because of the want, at the first trial, of proof of a fact which the losing party knew of, and might have produced, or by reasonable diligence might have found out. How much stronger does the principle apply, to a motion now made in the court of last resort, for a new trial, merely to enable appellants to bring forward a fact, which if it exists, they certainly were aware of before the first trial. Besides, look at the practical injustice. The defendants may have had proof fully sufficient to negative the proposed allegation as to notice, as well as all the other matters of excuse, already stated in the pleadings. Relying on the insufficiency of the latter, they demur, and obtain a judgment. This is now affirmed, and it is proposed to send the case back, when for aught this court can know, all the evidence the defendants had, in relation to the whole transaction, is lost to them without any default on their part. Such a course, would certainly not be in furtherance of any principle of justice.

MOTION OVERRULED BY THE COURT.



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Davis vs. Calvert, *et al.*—1833.

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ELIZABETH DAVIS vs. GEORGE CALVERT, CAROLINE  
CALVERT, *et al.*—June, 1833.

The third section of the first sub-ch. of the act of 1798, ch. 101, provides, "that no will, testament or codicil, shall be good and effectual for any purpose whatsoever, unless the person making the same, be at the time of executing or acknowledging it, of sound disposing mind, and capable of executing a valid deed or contract." These latter words are of importance in the investigation touching the mental capacity of a testator. He who is not competent to execute a valid deed or contract, is under the testamentary system of the State, incompetent to make a valid will or testament.

The testator's capacity is to be determined by the condition of his mind, at the time of his executing the will or testament; and for the purpose of shedding light upon that, evidence of its condition, and of his bodily imbecility, both before and after the period of his executing or acknowledging his will may be produced. It is not of itself sufficient to avoid a will or testament that its dispositions are imprudent, and not to be accounted for. But a will or testament may by its provisions furnish intrinsic evidence involving it in suspicion, and *tending* to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty.

The contents of a will or testament; the manner in which it was written and executed; the nature and extent of the estate of the testator; his family and connexions; their condition and relative situation to him; the terms upon which he stood with them; the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself; the circumstances under which the will was made; are all proper to be shown to the jury, and often afford important evidence in the decision of the question of a testator's capacity to make a will.

A will may be avoided also for fraud, importunity, and undue influence.

Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud; nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession, or persuasion, or flattery unaccompanied by fraud or deceit, and where the testator has not been threatened or put in fear by the flatterer, or persuader, or his power, or dominion over him, will not have that effect; but there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have the effect (under circumstances) to avoid a will.

That degree of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render

the instrument not his free and unconstrained act, is sufficient to invalidate a will; and this, not only in relation to the person alone by whom it is so procured, but as to all others who are so intended to be benefitted by his undue influence.

Fraud vitiates every thing with which it is connected. A will obtained by fraud is void.

Fraud is never to be presumed, yet it is not necessary to prove it by positive and direct testimony.

In a question of fraud, any fact, no matter how slight, bearing at all upon the point at issue, and not wholly irrelevant, may be admitted as evidence; but the circumstances when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact they are offered to establish.

It is a well settled rule of evidence, that remote and collateral facts and circumstances not pertinent or relevant to the issue to be tried, are inadmissible in evidence; but it is equally well settled, that facts and circumstances tending to prove the issue are admissible.

It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation; in such cases, the court not *clearly* seeing that it is wholly irrelevant to the issue, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it, that it will turn out to be pertinent and material.

Declarations adverse to a will, and bearing upon or tending to prove certain issues framed by the Orphans Court upon a *caveat* to a will, made by the executor of the will, who was also defendant on the record, and a contingent devisee representing every interest under the will, are competent evidence to go to the jury.

Upon an inquiry whether a will was obtained by fraud or undue influence, the condition, character, and conduct of the persons drawn around the testator, are of importance to be inquired into in reference to his family and relations, the extent and nature of his estate, the character of the dispositions of the will, and the persons to whom the property is given.

The statement by counsel of what they expect to prove in opposition to the statement on the other side, is not sufficient to lay a foundation for letting in testimony otherwise inadmissible.

If any part or clause of a will was first suggested to a testator by any other person, and adopted by such testator, such adoption ought not to be the result of his incapacity or weakness of mind, nor of fraud, circumvention or undue influence, and whether it is so, is for the jury from all the facts and circumstances to decide.

To invalidate a will on the ground of fraud, or undue influence, it is necessary that it should have been induced by fraud, circumvention, deception, imposition, or undue influence, operating upon and controlling the testator at the time it was executed, of which, and in what degree he was so influ-

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enced and controlled, is for the jury to decide; and it is not necessary, that such fraud or undue influence should have been immediately and directly exerted, at the particular time at which the will was made, nor is it material by whom practiced.

In the trial of issues framed by the Orphans Court upon a *caveat* to a will, the evidence is not necessarily confined to the facts expressly put in issue, but any fact which tends to prove the fact in issue, may be given to the jury. So where the nature of the case makes an inquiry into the true paternity of children, described in the will as the children of the testator, necessary, as where the fraud is alleged to consist in inducing the testator to believe that such children were his own, when they were not, and so directing his bounty to them, that fact, as a part of the machinery of the fraud may be examined into; and upon the same principle the capacity of devisees named in a will to take the property devised, and the character and consequences of devises over in case of the incapacity of the devisees first named to take, as where they are slaves, may become material for the consideration of the jury.

#### APPEAL from *Montgomery County Court*.

On the 25th of January, 1831, a *Caveat* was filed in the Orphans Court of *Montgomery* county, by the appellant, as the next kin of a certain *Thomas Cramphin*, then lately deceased, against the admission to *probate*, of a certain paper writing, executed on the 30th June, 1824, purporting to be the last will and testament of said *Cramphin*, and two codicils thereto, dated respectively on the 1st of November, 1824, and the 14th of October, 1825, which had been exhibited by the appellee, *George Calvert*, for probate in said court, and of which the said *Calvert* was named the executor. The other appellees are the devisees and legatees under the will. After the appellee *Calvert*, had answered the petition filed at the time of entering the *caveat*, the Orphans Court upon the prayer of the appellant, directed the following issues to *Montgomery County Court*.

1st. "Whether the said *Thomas Cramphin* at the several times of signing the said paper or instrument of writing purporting to be the last will and testament of said *Cramphin*, with the several additions purporting to be codicils thereto, was of sound and disposing mind."

2d. "Whether at the several times, mentioned in the preceeding issue, was the said *Thomas Cramphin* urged

thereto by the importunities of the defendants, or either of them, which he was too weak to resist, and under circumstances which left him not free to act in the disposition of his estate.”

3d. “Whether the said several signatures of said *Cramphin*, to said papers, purporting as aforesaid, were his own free and voluntary acts, to which he was induced with a knowledge of the contents of the same, and without the exercise of an undue influence by the said defendants, or either of them, which in his then situation, and then imbecility of mind, prevented him from making a disposition of his property according to his own free will.”

4th. “Whether the execution of said papers by the said *Cramphin*, was procured by fraud and by misrepresentation, by the defendants, or either of them, or by others acting with the privity, and by the direction of them, or any of them.”

5th. “Whether the said *Thomas Cramphin*, in the situation in which he was placed, and the circumstances connected with the execution of said papers, purporting as aforesaid, at the several times when the same were executed by him, was capable of knowing the contents of said papers, the manner in which they disposed of his estate, and of withholding his assent to the same.”

6th. “Whether the said papers purporting as aforesaid, be void by reason of undue influence, fraudulent devices, importunities, impositions, misrepresentations, and deceits practiced by said defendants, or their procurement, upon said *Cramphin*, to induce him to execute said papers.

7th. “Whether said *Thomas Cramphin*, at any time subsequent to the execution of said papers, purporting as aforesaid, was desirous of altering the same, and whether he was prevented therefrom by the management, fraud, undue influence, or importunities of said defendants, or any of them, or others by their procurement.”

1. At the trial, the plaintiff gave evidence to the jury of the various facts and circumstances relied on to prove the



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said issues on their part, and among other things, to prove that the said defendant, *Caroline Calvert*, being a slave belonging to the other defendant, *George Calvert*, the trustee, devisee, and executor named in said will, and his reputed illegitimate daughter by a woman slave, did sometime on or about the seventy-fifth year of the age of the said *Thomas Cramphin*, form an illicit connexion and intercourse with said *Cramphin*, and live with him as his mistress, from that time till his death, which happened in the ninety-second year of his age, sometime in the month of December 1830. That during that time she was delivered of eleven children, eight of whom were born, and one of whom died, before the execution of said supposed will, leaving the seven named in the said will then alive, the remaining three of the eleven having been born afterwards, and being yet alive. That the said *Caroline*, was emancipated by the said *George Calvert*, two days before the execution of said will, by a deed of emancipation duly executed, acknowledged, and recorded, including the emancipation at certain specified ages of her said seven children, as appears by the deed which he read to the jury. He also proved, that at the time of the execution of said deed, the said *George Calvert* executed a bill of sale, accompanied by a delivery of the said seven children, to said *Caroline*, which bill of sale he likewise read to the jury.

And among other facts and circumstances given in evidence by the plaintiff, and relied upon to prove the want of a sound and disposing mind, and memory, in said *Cramphin*, and the frauds, circumvention, deception, imposition, and undue influence practiced on the said *Cramphin* by the said *Caroline*, in obtaining the said will and codicil, she tendered, and offered to prove to the court and jury by competent and credible witnesses this further fact, to be taken in connexion with other facts and circumstances, to wit: that the said *George Calvert*, in conversation a few days after the death of said *Cramphin*, declared, that though he had promised the said *Cramphin* to provide for said

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children, yet he did not consider himself bound to do so, because he was convinced they were not the children of said *Cramphin*. To the admissibility of which evidence the defendants objected, and the court (KILGOUR, and WILKINSON, A. J.) sustained the objection, and rejected the evidence offered as last aforesaid.

And the plaintiff further to maintain the issues on her part, offered to prove by competent and credible witnesses, that the said *Caroline Calvert*, before and until the time she formed such illicit intercourse with said *Cramphin*, and became his mistress, led a lewd and dissolute life, and was a common prostitute. To the admissibility of which last evidence the defendants objected, and the court sustained the objection, and rejected the same.

The plaintiff then further offered to prove by competent witnesses, that the said *Caroline*, during the time she so lived with said *Cramphin* as his mistress, and whilst he was induced by her to confide in her fidelity to him, indulged herself in secret intrigues and lewd intercourse, unknown to said *Cramphin*, with other men besides said *Cramphin*. To the admissibility of this evidence also, the defendants objected, and the court sustained the objection.

The plaintiff further offered to prove by competent witnesses, that the said children mentioned in said supposed will, were falsely, artfully, and deceitfully, and by the undue and overweening influence, and dominion of said *Caroline* over the mind of said *Cramphin*, imposed on him as his children, when in fact they were not his, but the spurious fruits, and issue of her secret and lewd amours with other persons. The defendants objected likewise, to the admissibility of this last evidence, and the court sustained the objection.

The plaintiff then further to maintain the issue on her part, offered to prove by competent witnesses, that said *Cramphin*, by reason of old age, debility, and infirmity, was physically incapable of begetting the said children; but the defendants objected to the admissibility of the evidence, and the court sustained the objection.

The plaintiff further offered to prove, that the said defendant, *George Calvert*, was well convinced, and did verily believe, and had good reason to be convinced, and believed, that the said children were not the issue of the body of said *Cramphin*, and that he did nevertheless, aid and abet the false and deceitful imposition of them on said *Cramphin* as aforesaid ; to the admissibility of which evidence the defendants objected, and the court sustained the objection, and rejected the evidence so offered as last offered. To all and every of which decisions of the court, against the admissibility of the several matters so tendered, and offered to be proved on the part of the plaintiff, and so rejected as aforesaid, the plaintiffs excepted.

2. Upon the trial of the issues as aforesaid, the plaintiff's counsel, in opening the plaintiff's case to the jury, before the examination of the evidence, stated the evidence proposed to be introduced by the plaintiff, to support the allegations of circumvention, fraud, misrepresentation, imposition, and deceit in the procurement of said will ; among other things, that the defendant, *Caroline Calvert*, being a mulatto slave, and the illegitimate daughter of the defendant, *George Calvert*, by one of his own slaves, had lived with said *Cramphin* in his extreme old age as a mistress, had during their co-habitation in the course of about sixteen years borne eleven children, all of whom she had fraudulently and artfully imposed on him as his, and by her undue and overweening influence had made him believe it, and that said defendant, *George Calvert*, the devisee, trustee, and executor named in said will, had assisted in leading and inducing said *Cramphin* to confide in the genuineness of said children as of his own begetting ; whereas, the said children would be shown to have been the offspring of the loose amours of said *Caroline* with other persons, and not the children of said *Cramphin*. Whereupon the counsel for the defendants in like manner, before the examination of any of the evidence, opened the defendants' case to the jury, stating beforehand, the

evidence, and the grounds on which they expected to maintain the validity of said will, and repel the allegations, and evidence of the plaintiff; and among other things, that said *Caroline*, though living with said *Cramphin*, as a mistress, and carrying on an illicit intercourse with him, was in all other respects, of good character and conduct, faithful to him as a mistress, and a tender nurse of his old age, and a useful superintendent of his household. That said children were acknowledged by him, and treated by him with all the care and affection of a father. That they were in fact the genuine offspring of the illicit intercourse between said *Cramphin* and said *Caroline*, a fact evidenced among other things by their strong personal resemblance; and the defendants' counsel then read to the jury the plaintiff's libel, and the said *George Calvert's* answer thereto. In consideration whereof, the plaintiff's counsel insisted to the court, that such opening on the part of the defendants, amounted to a waiver of any objection to the admissibility of evidence touching the true paternity of said children; and consequently, that the evidence offered by the plaintiff and rejected by the court, as set forth in the former bill of exceptions, ought to be admitted, even if strictly inadmissible, without such opening on the part of the defendants. But the court (KILGOUR, and WILKINSON, A. J.) decided that the said evidence was inadmissible, notwithstanding such opening on the part of the defendants. *The plaintiff excepted.*

3. After all the evidence on both sides had been given to the jury, and after the arguments, and summing up of counsel had been concluded, the *defendants* prayed the court to deliver to the jury the following instructions:

1. That it is not a sufficient objection to the papers exhibited as the last will and testament, and codicils thereto, of *Thomas Cramphin*, that the jury should believe, from the evidence before them, that any clause, or part of the same, was not the original, and unprompted suggestion of the testator's own mind, but was first suggested by some other per-



son ; provided they shall believe from said evidence, that the testator fully comprehended said suggestion, and with a competent mind adopted and made them his own.

2d. That before the jury can find a verdict for the plaintiff, on the ground, that the said will and codicils were obtained by fraud, or undue influence, they must believe from the evidence in the case, that these particular instruments were induced by such fraud, or undue influence ; and that no evidence of influence at other times, or in regard to other matters, can be important, further than as they may enable the jury to form a judgment of the instruments submitted to their consideration, in the issues joined between the parties.

3d. That before the jury can decide against these instruments as obtained by fraud, they must be satisfied from the evidence, that fraud is actually proved. It is never to be presumed, or inferred, without evidence.

4th. That the question, whether the children named in the instrument exhibited as the last will and testament of *Thomas Cramphin*, were, or were not the children of the said *Cramphin*, is not embraced within any of the issues in this cause, and that the evidence to prove, or disprove such paternity, is not relative to any of said issues.

5th. That whether any of the devisees named in said papers, purporting to be the last will and testament, and codicils thereto, of *Thomas Cramphin*, have, or have not a legal capacity to take under the said instruments, is wholly irrelevant to the present issues or any of them.

6th. That if the jury believe from the evidence, that the testator, at the time he dictated, and executed the said will, and codicils, was of sound and disposing mind and memory ; and also, if the jury believe from the evidence, that the said testator was not at those times controlled and governed in the making and executing of the same, by the fraudulent suggestions, or undue influence of *Caroline*, or *George Calvert*, or either of them, or by any of the devisees under the will, then they must find for the defendants, on the first seven issues.

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7th. If the jury shall believe from the evidence, that the said *Thomas Cramphin* was induced by persuasion, request, or importunity of said *Caroline*, or any other person, to make the said last will and testament, and codicils thereto, still such persuasion, request, or importunity, will not impair the validity of said instrument, unless the jury shall further believe from the evidence, that such persuasion, request, or importunity was fraudulent.

To the granting of which instructions, or any of them, the plaintiff objected, but at the same time prayed the court, that if notwithstanding such objection, the said instructions, or any of them should be granted, that the following additional instructions, as applied to each and every of the instructions so prayed by the defendants aforesaid, be given, to wit :

1st. To the defendants' first prayer, the plaintiff objects, but if granted, prays the following addition to be made thereto.

“But it is for the jury to decide, from all the facts and circumstances in evidence, whether, and in what degree such suggestion, or the adoption thereof, by the testator, was the result of incapacity, or weakness of mind, or of fraud, circumvention, or undue influence.”

2d. To the second, the plaintiff objects ; but if granted, prays that the following additional instruction may be given.

“That it is for the jury to decide, from all the facts and circumstances in evidence, whether the said will and codicils were obtained by fraud, circumvention, deception, imposition, or undue influence, and that it is competent for the jury to decide from facts, and circumstances of fraud, circumvention, deception, or imposition, or undue influence, precedent, and subsequent to the execution of said instruments, whether such fraud, circumvention, deception, imposition, or undue influence, existed and operated at the time of the execution of said instruments, and in what degree induced the execution of said instrument.”

3d. The plaintiff also objects to the third ; but if contrary to the plaintiff's objection, the defendants' third prayer be granted, the plaintiff prays the following additional instruction:

"That fraud is not to be considered as a single fact, but a conclusion to be drawn from all the facts and circumstances in the case ; that it is not necessary to prove it by direct and positive proof ; and though never to be presumed without evidence, it is competent for the jury, and the proper province of the jury to decide, whether it may, or may not be fairly presumed from the facts and circumstances in evidence, and that these issues do not confine the plaintiff to direct proof of actual fraud, but extend to the procurement of said will, and codicils, by circumvention, or by means of dominion, and undue influence over the mind of the testator ; and that the said will and codicils may be as well impeached on the ground of having been obtained by circumvention and undue influence, as by proof of actual fraud."

4th. The plaintiff objected to the fourth likewise, because the evidence offered on the part of the plaintiff, to prove that said children were not the children of *Cramphin*, has been altogether excluded by the decisions of the court, as stated in the former exception ; but if this fourth prayer of defendants be granted, the plaintiff prays that the following additional instruction may be given :

"That it is competent for the plaintiff's counsel to argue to the jury, as they have argued to the jury, and for the jury to consider, that if it be proved to their satisfaction, from all the facts and circumstances in evidence, that the said will was obtained by fraud, deceit, imposition, circumvention, or undue influence ; then the jury may presume, that the acknowledgment of said children in said will was induced by the same unfair means as the rest of the will."

5th. The defendants' fifth prayer was objected to in like terms, but if granted, the plaintiff prays the following additional instruction.

“That though the question, whether the children named in said will, be capable or incapable as slaves, of taking the benefit of the devise, in their favor, or whether the devise over to *Caroline Calvert*, being a free woman, at the time of the execution of said will, takes effect in consequence of the incapacity of said children; or whether the devise over in the last codicil to *George Calvert*, takes effect, in consequence of such incapacity to the exclusion of said *Caroline*, cannot be decided on these issues; yet the capacity of said children to take under such devise, and the character and consequences of said devises over in case of their incapacity, are among the circumstances competent to be argued to the jury, and by them considered in deciding on the several issues, touching the mental capacity of said *Cramphin*, and the fraud, deception, imposition, circumvention, and undue influence, charged in said issues.”

6. The defendant's sixth prayer was objected to in similar terms; but if granted, the plaintiff asked this additional instruction.

“That it is competent for the jury, and their proper province, to decide from all the facts and circumstances in the case, whether such fraudulent suggestions or undue influence, acutually operated on the mind of said *Cramphin* at the time stated in the defendants' sixth prayer, and induced him so to dictate and execute said instruments, though such fraudulent suggestions were not made, at the precise time, or times aforesaid, nor any act in the palpable exertion of such undue influence was then committed.

7. A similar objection was made to the granting of the defendants' seventh prayer; but if granted, this addition was prayed to it by the plaintiff.

“Or were carried into effect by circumvention, or by means of undue influence, or dominion over the mind and actions of said *Cramphin*.”

The court (KILGOUR, and WILKINSON, A. J.) granted the instructions prayed by the defendant, and likewise all the plaintiff's additional instructions, except the fifth, which



was rejected; and at the instance of the defendant they explained the third, and seventh additional instructions, by remarking, that circumvention and undue influence implied fraudulent practices. The plaintiff excepted to the instructions so granted by the court on the prayers of the defendant; and to the refusal of the court to grant the said additional instructions so prayed by the plaintiff.

*Defendants' fourth exception.* The defendants, when the case was called up, moved the court to modify the issues which had been transmitted from the Orphans Court, so as to make the same correspond in terms to the real question in issue before that court, and to make it involve the single question, whether the papers purporting to be the last will, and two codicils thereto, of *Thomas Cramphin* are, or are not, the true and genuine last will and testament, and codicils thereto, of said *Cramphin*; and also to determine that the respondents exhibiting the said instruments, as such last will and codicils thereto, hold the affirmative of said issues, and bound to prove the genuineness, and legal validity of said papers, and are therefore entitled to open and conclude the case. The court refused the application, and the respondents excepted.

The verdict of the jury being for the defendants, the plaintiff appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, and ARCHER, J.

*A. C. Magruder*, for the appellant.

The issues transmitted to the county court in this case, presented three inquiries. 1. Had the alleged testator at the time of executing the several papers, purporting to be his will, and codicils thereto, that sound disposing mind and memory, without which, no will is valid? 2. Was the execution of these papers procured by fraud, misrepresentation, or undue influence? 3. Was *T. C.* prevented by fraud from revoking them? To this last issue, the exceptions before the court have no relation. The testimony set

forth in the first exception, was designed (in connexion with other proof to be adduced) to prove the incapacity of the deceased, to execute a valid will at the several times when these papers were executed, and also, that the execution of them was procured by fraud, and undue influence. Some of this proof relates to the declarations of *G. Calvert*, which were clearly admissible. 2 *Stark.* 390, and note (A.) 1 *Phillips Ev. sec.* 6, 72. *Roscoe*, 28. A part of the proof which was rejected, was offered to prove, that the children of *Caroline*, though described in the will as *Cramphin's* children, were not so in fact, and that two of the defendants, to one or the other of whom, if the will be established, the estate will go, fraudulently represented them to be, and induced him to believe they were his children. Such proof is admissible in a case like this. *Peake's Ev.* 357. 1 *Phil. Ev.* 112. *Goodright vs. Saul*, 4 *Durn. and East.* 356. It was not contended by the plaintiff, that at all times, and in all places, and upon all subjects, the deceased's mind was not sane, and that he could no longer be intrusted with the management of his own affairs. The conduct of those around testators, as well as the imbecility of their minds, is generally the subject of inquiry in courts of justice. *Peake's Ev.* 375. The party alleging a testamentary incapacity is not required to prove an absolute incapacity. The proof of relative incapacity is sufficient. That the particular instrument was the effect of that undue influence which necessarily implies a degree of weakness at the time, and *quoad the instrument*, making it not an instrument arising from the fair bias of his own mind, but from the exercise of an improper influence. *Bates vs. Graves*, 2 *Ves. Jr.* 288. The mind of a testator when he makes his will, must be equal to the work in which he is engaged, *Harrison vs. Rowan*, 2 *Wash. C. C. R.* 580. "If a dominion is acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness, and discretion to regulate his affairs in general; yet if such dominion, or influence was acquired over him, as to prevent the exercise

of such discretion, it would be equally inconsistent with the idea of a disposing mind ; and perhaps the most probable instance of such a dominion being acquired, is that of an artful woman having taken possession of a man, and subdued him to her purposes." 1 *Cox's Ch. Cas.* 354. The deceased is aged, infirm, and credulous ; he is in the hands of a woman who has indeed "taken possession of him, and subdued him to her purpose." He is deceived by those around him, and who would now profit by the deception. It is under this delusion, that he makes his will, leaving to the "woman" by whom he has been induced to believe that he has children, a part, and to these children, almost the entire residue of his large estate, to the exclusion of his heirs. The plaintiff asks leave to prove by what artifices, and misrepresentation, the influence was acquired. "The competency of the mind is to be judged by the nature of the act to be done, and from a consideration of all the circumstances of the case." *Marsh vs. Tyrrel*, 4 *Eccle. Rep.* 51. And is it not an important circumstance, that these children had been imposed upon him as his own, when they were the children of another person, and of course the deceased could be under no obligation to provide for them? But the question here to be considered, is not whether the mind of the deceased was so far enfeebled, as to hinder him from making a valid will under any circumstances, but whether *this will* was not obtained by fraud, and the exercise of undue influence. It has been correctly said, that "fraud is included in all questions of *non-compos*, which pre-supposes the formal act." "The mind must be free, and not moved by fear, fraud, or affection. 7 *Bac. Abr.* 303. Fraud is any kind of artifice by which another is deceived. 1 *Mad.* 256. In such a case as this, it may be said, "if we see the least spark of imposition at the bottom, or that the donor is in such a situation with respect to the donee, as may naturally give an undue influence over him. If there be the least *scintilla* of fraud in such a case, the court will interfere." 1 *Mad.* 283. *Green vs. Skep-*

worth, 1 *Eccles' Rep.* 34. In *Clark and others vs. Fisher, et al.* 1 *Paige's Ch. Rep.* 171, the sister-in-law of the deceased procured from the *Alms House* a child, which she imposed upon the testator as her child, the daughter of his brother whom she had married, and of course his niece. Under this belief he left this girl one-fourth of his estate. This testimony was not only received, but was deemed of some weight in the decision of the case. See also, *Patterson vs. Patterson*, 6 *Serg. and Rawl.* 55, and *Dietrick vs. Dietrick*, 5 *Ib.* 207. It may be said however, that if fraud was practiced in this case, it was practiced by the mother, and others, and not by the children, and therefore that the will, so far as it makes provision for them, ought not to be set aside. In the case already referred to in *Paige's Ch. Rep.* the will was set aside, although the little girl, the supposed neice, was innocent of the fraud. 14 *Ves.* 289.

2. Upon this exception it is contended, that the statement made by the defendant's counsel, and the answer of *Calvert*, under oath, read as proof, to influence the verdict, gave the plaintiff the right to offer the testimony set forth in the former exceptions, even although it was originally inadmissible. It ought at all events to have been received as rebutting evidence, to counteract the effect of that statement, and to contradict the answer.

3. This exception is taken to various instructions given by the court to the jury, at the instance of the defendants. It may be contended, that the additional instructions given on the prayer of the plaintiff, precludes her from complaining of the former, as by these she could not be injured. This assumes, what with respect to some of them cannot be denied, that they are palpably inconsistent with each other. It does not follow, however, that no injury is done to the plaintiff. A party has a right to insist that the court shall give to the jury no instructions which are not correct, and by which he may be prejudiced; and that the court shall so expound the law to the jury, that they shall not be left to



judge to which of two instructions, contradicting each other, they are bound to pay respect.

The first instruction makes the paper in question the will of the deceased, although suggested by some other person, if the jury believed he fully comprehended the suggestions, and with a competent mind made them his own, no matter though he was moved by an influence which he was too weak to resist. There may have been proof in the case that these suggestions were made by those who had previously incensed him against his blood relations, and might not these feelings thus produced, have caused him to make these suggestions his own? *Bennet vs. Vade*, 2 Atk. 327. A last will and testament, says *Swin. ch. 3, p. 16*, “is an advised purpose of the testator’s mind. In it we should show ourselves both wise and just. Our testaments and last wills ought to be framed on discretion, and built on sound and constant determination.”

2. This instruction assumes, that at other times and by some body, and in relation to other matters, an undue influence had been exercised. Of course it might have been exercised by the very persons who are charged with having procured the will, by the exercise of an undue influence. Yet proof of this undue influence having been successfully exercised, can be of no value to the plaintiff; it is not competent unless the proof of its existence and influence at other times, will enable the jury to form a judgment of the instrument submitted to their consideration.

3. According to this instruction, the fraud alleged must be actually proved, or the jury cannot decide that these instruments were obtained by fraud. If this be the law, our testimony, had it been admitted, would have been of no value, as the purpose was to establish the fraud by circumstances, from which, when combined, it was to be inferred. *Harrison vs. Rowan*, 3 Wash. C. C. Rep. 580. 2 Eccl. Rep. 131. Sir John Nicholl observes, “cases of fraud, if tolerably well concerted, are generally speaking, only to be

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detected and defeated by induction of particulars, many perhaps apparently trivial.”

*Fourth instruction.* The court had already excluded all the testimony relative to the paternity of the children, and now, after withholding that proof from the jury, they instruct them that it is entitled to no weight whatever, “because it is not embraced within any of the issues.”

In the *Pennsylvania* cases which have been cited, the only issue was *devisavit vel non*. The issues in this case are sufficient to authorise the introduction of any testimony whatever, which could be admitted to impeach the will upon any ground. Who was the father of these children is not a question expressly submitted to the jury in this case for their decision. But if our allegations with respect to these children, their paternity, and the deception practiced upon this old man, relative to their paternity, be true, then, from these truths, with other matters proved in the cause, the jury could legitimately infer all that we allege in regard to this will. The evidence to establish undue influence is usually “compounded of ingredients, various in their number, and remote in their consequences and connexion.” In the *New York* case, not only was the falsehood, relative to the little girl, admitted in proof, but it was pronounced a palpable fraud to impose upon the testator as his niece, one not connected with him, and the rule was urged and relied on, *falsus in uno falsus in omnibus*.

The *fifth instruction* decides, that the legal capacity of the children to take, was a question wholly irrelevant to the issues. It is not contended by the plaintiff, that a devise to one, who is not competent to take, necessarily avoids the will. But it is maintained, that the provisions of the will may be looked at, as among the circumstances whence the fraud and undue influence are to be inferred. The testator must be capable of disposing of his property, not only in reference to the amount of it, but also in reference to the situation of those who are, or ought to be the objects of his bounty. *Clark vs. Fisher*, 1 *Paige*, 173. He must have the

capacity of recollecting, discerning and feeling the relations, connexions and obligations of family and blood. 2 *South. Rep.* 455. A party impeaching a will may give evidence that it is an unreasonable one. 6 *Serg. and Rawle*, 55. In the case before us, all of those who have claims—his numerous relations—are entirely overlooked, and those for whom he is made to provide, may indeed be considered strangers to him, and are incapable of taking property by any description whatever. The issue "*devisavit vel non*" involves the validity of the execution, and not the contents of the will, yet, said the Judges in *Pennsylvania*, the contents, as far as they have a bearing on the question of execution, are pertinent, and with this view the whole will is usually read.

*Sixth instruction.* The error of this instruction consists in saying, that the deceased must be shown to have been controlled and governed by the fraudulent suggestions at the time of executing the will. Perhaps the woman who lived with him had suggested, at various times, that his relations had ceased to respect him. Perhaps such suggestions had the effect of prejudicing and incensing him against them; and they may have been designed to induce him at once to make his will, unless, if postponed, his capacity might be questioned by his relations; still if the law is correctly expounded by the court in this instruction, the jury could not consider proof of the above circumstances in forming their verdict.

*Seventh instruction.* A will may be void as being the result of over importunity, though such importunity is not fraudulent. Any importunity which imposes a constraint on the testator, which takes from him the perfect freedom of his mind, will avoid the will, though it may not amount to fraud. 1 *Swin.* 22. It was the province of the jury to decide, from a consideration of all the circumstances, whether the testator was controlled by improper influence, and the object and effect of the instructions of the court being to prevent this, the judgment must be reversed.

*Swan, R. S. Cox, and Johnson* for the appellees.

In this case certain distinct issues were made up in the Orphans Court, and sent for trial to the county court, and not the general issue of *devisavit vel non*, and it is not true that any evidence which would have been admissible under the latter issue, should have been received here. These instruments remained in the testator's hands from 1825 to 1830, without any attempt on his part to alter or revoke them. The presumption of law, is now strongly in their favor, and that the proof adduced to assail their validity, was insufficient for that purpose. The evidence, for and against the will, is not in the record, though it was the duty of the appellant, who prepared the exceptions, to have inserted it, that this court might see clearly whether error has, or has not been committed. It is not sufficient that the appellant should say he offered certain evidence in itself immaterial, in connexion with other circumstances which might make it relevant, without stating those other circumstances, that the court may see how far its admissibility is affected by the omitted circumstances. In the absence of such proof, every presumption is to be made in favor of the judgment. There is no evidence of the influence of *Caroline*, which has been the subject of remark, nor of the magnitude of the testator's estate, nor of his estrangement from his relations. The record, says the appellant, offered certain proof, upon which she relied, but what it was, does not appear, and consequently the evidence in the record can derive no aid from the other circumstances with which it was said to be associated.

1st. It was proposed to prove Mr. *Calvert's* declarations in 1830, in relation to the children, as a substantive and independent piece of evidence, to vacate a will which was made five or six years before. Such declarations, made at such a time, could have no tendency to prove incapacity or influence; nor could they under any circumstances, be evidence to defeat a will in which other persons were interested, and claim rights under it totally distinct and separate from him.



Evidence of the character of *Caroline* was equally inadmissible. The intercourse between her and the testator commenced eleven years before the will was made, and the attempt is to destroy the will, by proving her conduct to have been dissolute prior to that period. It is not possible to accomplish such a purpose by such means, particularly when presented as an insulated fact. Proof of her misconduct, during the intercourse between her and the testator, was also offered for the same purpose, though such misconduct was unknown to the testator. If the proof offered had been, that he knew of her misconduct, and notwithstanding such knowledge, devised her his estate, it might be evidence to show either a want of capacity, or that her ascendancy over him was such as to deprive him of his free will; but surely no such inference can be deduced from facts, of which the testator was ignorant. The offer to prove that the testator was not the father of the children, is not free from ambiguity. It does not appear which were referred to, those born before, or those subsequent to the execution of the will. But suppose it refers to those who take a beneficial interest under it, it is evidence, when standing alone, to prove either incapacity or undue influence over the testator's mind. The cases cited on the other side, in which this inquiry has been indulged, are cases in which the capacity of the devisee to take, has been the subject of examination, or where the imputed paternity appears to have been the moving cause with the testator; as where a man makes a devise to another, supposing him to be his brother, if he turns out not to be, the devise fails; or where the character of the devisee is mistaken by the testator, and the party benefited is guilty of the imposition. *Kenwell vs. Abbott*, 4 Ves. 802. *Ex parte vs. Wallop*, 4 Bro. Ch. Rep. 90. But in cases like the present, inquiries, as to the paternity of parties, has never been permitted. *Wilkinson vs. Adam*, 1 Ves. and B. 422. *Ib.* 453. *Ib.* 462. *Gordon vs. Gordon*, 1 Merrivale, 141. The supposed relationship of

the devisees to the testator in this case, does not appear to have been the operating motive of the will. With respect to *Caroline*, the language used seems to have been intended as a mere *descriptio personæ*.

The proof proposed to be offered, with regard to the physical capacity of the testator, could only have consisted of opinions. The facts, from which such an opinion could be deduced, were already before the jury, and it would be strange if the opinions of witnesses, in relation to the capacity of the testator to be the father of the devisees, should be permitted to influence the decision of the jury, with reference to his capacity to make a will; more particularly when relied on as an isolated fact for that purpose. As to Mr. *Calvert's* belief of the paternity of these children, surely that could have no influence on the verdict, one way or the other, and of course it was not admissible evidence.

The object of the evidence in this exception was not merely to defeat particular portions, but the whole will; as well those for the benefit of persons of admitted capacity to take, and to whom nothing improper is imputed, as those whose competency is doubtful, and conduct suspicious. Evidence showing that part of a will is void, is not admissible, in the trial of an issue, going to the entire instrument; neither are remote and collateral facts admissible. 3 *Stark. Ev.* 380. *Kenwell vs. Abbott*, 4 *Ves.* 802. *Plume vs Beale*, 1 *P. Wms.* 388.

2. Upon the second exception they contended, that the defendants had offered no evidence, which the proof proposed to be given by the plaintiff could be necessary to rebut; but if they had done so, still, if it was not pertinent, rebutting evidence would be inadmissible. *Stringer et al. vs. Young*, 3 *Peters*, 320. *Ib.* 337. *Walkup vs. Pratt*, 5 *Harr. and Johns.* 56.

*Third exceptions.* In considering the instructions of the court, in this exception, it is not necessary to enquire, whether, as originally prayed by the defendants, they were

correct, or not. If the qualifications afterwards given, upon the prayers of the plaintiff, make them sound, the judgment must stand, as the inquiry always is, has the law been correctly expounded to the jury. If it has, neither party can complain. These instructions are to be viewed as if the qualifications had formed a part of defendants' prayers, and had been originally incorporated in the instructions as actually given to the jury.

The objection of the plaintiff is to the prayers, as made by the defendants, and not to the instructions of the court, as modified at the instance of the appellant. When the plaintiff asked for the modifications, the defendants' prayers are to be considered as having been granted, and that distinct prayers, corresponding with these modifications, are made by the plaintiff; and if so, he cannot object to the instructions as modified, as they are the result of his own prayers. And the exception is so framed, being not to the instructions as actually given, but to the prayers as made by the defendants. Suppose, for example, the instructions as prayed by the defendants were right, and the error consisted in their modification upon the plaintiff's application; would he be allowed to reverse the judgment, for an error so induced? If the law was properly expounded to the jury, by the instructions taken collectively, the judgment will not be reversed, though some one opinion may be erroneous. *Craycroft vs. Craycroft*, 6 Harr. and Johns. 57. *Coale vs. Harrington*, 7 Ib. 147. 3 *Gill and Johns*. 450.

With reference to the first instruction, it does not appear what the suggestion complained of was, or what clause of the will, was the result of such suggestion. It may have been simply in relation to the *mode* in point of law, of accomplishing the testator's intention, or in regard to some inconsiderable provision, and for such a suggestion, it is proposed to vacate the *whole will*. If such be the law, few of the complicated testamentary dispositions now in use, would stand, as they are never made, and can never be made, without the advice, and suggestion of counsel. Surely,

when a party objects to a will, on account of the suggestions of others, he should show what those suggestions are.

The second instruction supposes a capacity to devise, and leaves the will obnoxious only to the charge of fraud, and misrepresentation in making it; and this is the precise point presented by the issue, which does not extend to frauds, &c. at other times. But the qualification extends the field of inquiry, to acts, prior, and subsequent to the execution of the will, in order to enable the jury to determine, whether it was, or was not the result of fraud.

*Third instruction.* This instruction does not say that fraud must be positively proved, but that it must be *actually* proved, either directly, or indirectly, positively or circumstantially; and when the court say, fraud cannot be presumed, the meaning is, that it cannot be presumed without evidence. *Hovenden, 17 to 27.* In the fourth instruction, the court is assumed to have been right in rejecting evidence, as to the paternity of the children, and the evidence being excluded, it follows, that the jury should not have been influenced by any thing which may have been said in the argument upon that subject.

The *sixth* instruction was given without qualification, and submits to the jury every question, except the capacity, or incapacity of the devisees to take. This is a mere question of *law*, and not fit for the consideration of the jury. It certainly cannot be said, that a man of sound mind, and in all other respects competent to make a will, has died intestate, because he has committed a mistake in the legal capacity, of some one, or more of the objects of bounty. Besides, in this particular will, the subject of the capacity of the devisees appears to have been in the mind of the testator, and the contingency of their incapacity is provided for. It is clear, therefore, that he was *not deceived*, upon which ground alone, a will may be impeached for such a cause. It would be singular indeed, if a will should be vacated on account of a contingency, which the testator had anticipated, and guarded against.



In support of the sixth and seventh instructions, they cited *Swinburn*, 22, 887.

*Jones*, and *R. J. Bowie*, in reply.

The argument on the other side is, that our evidence only impeaches portions of the will, or the competency, or fraud of particular devisees. The first answer to this argument is, that these papers consist of a will, and two codicils, and some one or more of them, may be set aside, and the rest be established. It was certainly competent for the caveators to caveat one, or all; and if one alone could be attacked, why, when all are caveated, may not one be defeated, and the rest stand? The question here is, whether evidence, which impeaches a part only of a testamentary disposition of property, when the whole is caveated, has not in some degree, and to some extent, an influence upon the whole. Why should not a will be destroyed in detail, as well as altogether? It is surely competent to us, to show a fraud in one party, or in one part of the instrument, then another, and so on, until the whole is prostrated, and the same may be said of every ground, upon which the validity of this will is assailed. The question in this case, is a question of *probat*, involving the validity, and not the construction of the instrument, and the court of probat consequently is the proper, and only tribunal for its decision. A court of chancery has no jurisdiction in cases of this description, that court having nothing to do with the probat of wills, its office being only to expound them. It cannot decide on their validity. *Rob. on Wills*. 2 *Atk.* 324. 1 *Fonb.* 69, note (a.) 7 *Back. Abr.* 381. *Plume vs. Beale*, 1 *P. Wm.* 388.

*First exception* as to the declarations of *Calvert*. The first objection to the admissibility of these declarations is, that it does not appear to which of the children they refer: whether to the *ante nati*, or *post nati*. But they are spoken of, as the said children, which of course points to those who are named in the will, and issues, or at all events, it relates to all, including those so named. The expression

cannot refer exclusively to those who are not named in the will. The objection that his declarations are inadmissible as hearsay, does not seem to stand upon better grounds. He is the executor, and legal owner of the personal estate, and represents the rights of all the parties, and as their interests are inseparable, if the declarations referred to, are not evidence against the other parties, they are not evidence as against him; and in that way, if all the parties concerned had made separate declarations, affecting the validity of this will, they could not be received, because the declarations of each might be rejected, as injurious to the other parties. The fact is, however, that the declarations of any of the parties would be evidence against the rest. 1 *Phil. Ev.* 74, 75. *Harrison vs. Vallance*, 1 *Bingham*, 45. 4 *Stark.* 39 to 48. *Bauerman vs. Radenius*, 7 *Term. Rep.* 663. *Hanson vs. Parker*, 1 *Wilson*, 257. *Dowden vs. Fowle*, 4 *Camp.* 38. *Bell vs. Ansley*, 16 *East.* 143. *King vs. Inhabitants of Hard.* 11 *Ib.* 578. *Curry vs. Walter*, 1 *Esp. Cases*, 458. *Whitcomb vs. Whitney*, *Doug.* 652. *Wood vs. Braddick*, 1 *Taunt.* 104. *Peake's Cases*, 203. *Nicholls vs. Dowding & Kemp*, 1 *Stark. Cas.* 81. *Lucas, et al. vs. De La Cour*, 1 *Maul. and Selk.* 249. *Bac. Abr. Title Ev.* 673.

Even if the expression could be considered equivocal, still it was for the jury to weigh it. It was certainly admissible in *limine* on the part of the plaintiff, though subsequently, it might have been competent to the defendant, to ask the court to withdraw it from the jury.

There is no part of the evidence offered in the first bill of exceptions, but has a *tendency* to prove the questions in issue, taken either collectively, or individually, and having a tendency, it was admissible, though its weight may have been inconsiderable. *Davis vs. Barney*, 2 *Gill and Johns.* 382.

But the evidence was offered *collectively*, and not separately, and considered collectively, the effect on the decision of the jury must have been conclusive against the will. 1 *Phil. Ev.* 111. 2 *Evans Poth.* 29. To show what is

deemed a sound, and disposing mind, they referred to 2 *Southard*, 454, 458, 661, 667, 670. 1 *Coxe's Cases*, 355. *Clark vs. Fisher*, 1 *Paige*, 173. *Swinb.* 29. 3 *Stark. Ev.* 1704, 1705.

Cases have been cited to show, that parts of a will may be void, and parts good. This in some cases may be so, but when the objection is founded, upon both fraud and imbecility, if any part is void, the whole must be void, and if fraud has been committed, it is of no consequence, whether the party benefited is guilty or innocent. The will in either case is void. 14 *Ves.* 285.

It has been argued, that the plaintiff did not except to the instructions, as actually given to the jury. But the objection was to each instruction as prayed, and the whole then, were excepted to as granted.

It is impossible to contend, that a party has forfeited the benefit of his exception by moving additional instructions, because, although he objected to the defendants' prayers, he was compelled when they were granted, to assume in the further progress of the case in the county court, that they were right, and he was authorised, while reserving his exception to them, to ask for additional, or explanatory instructions; nor is there one of the original prayers, that are not erroneous now, if they were wrong as prayed, notwithstanding the additional instructions, and this must be the case, unless the court, in according the additions, meant to take back and reverse their former opinions.

1st. As to the first instruction. As an abstract rule of law this opinion may not be objectionable, but in its application to this case, it is clearly erroneous, because it separates a part of the evidence from the rest, and says that the part so separated, is not sufficient for the purpose, for which it was adduced; thus *destroying entirely*, the effect of a circumstance, entitled to some weight, and necessarily misleading the minds of the jury.

2d and 6th instructions. These they consider together. The objection to them is, that they limit, and qualify the

effect of the plaintiff's proof, by restricting the inquiry to the circumstances attending the making of this particular will, when he was entitled to lay before the jury, any circumstance going to show that the testator was not a *free agent*, without reference to time or place. And it is not material how the alleged influence over the testator was acquired, whether by fraud or superior intelligence, or in any other way. If it exist, and is exerted in inducing a will which would not otherwise have been made, it is void.

3d. The court in this instruction, say to the jury, that fraud is not to be presumed without evidence, which means proof of *actual fraud*; and they qualify the additional instructions, by saying, the circumvention and undue influence, mean, "fraudulent practices," and of course "fraudulent practices" must be proved, before a case of circumvention or undue influence can be established.

Now, it is perfectly clear that an overpowering mental dominion may be exerted, altogether depriving a party of freedom of will, without any fraud whatever. Besides, fraud, circumvention, and undue influence are stated in the books, as distinct grounds upon which wills are impeached, and they can hardly therefore be deemed, as meaning the same thing. 1 *Swin.* 22, and note. 1 *Fonb.* 72, 73.

In the 7th instruction the court say, that importunity to defeat a will, must amount to fraud. This is not so. If the importunity be such, that the testator cannot resist it, the will is void, though neither deceit nor misrepresentation be practiced, and although the party using it, is not benefited by the will, and his motives are fair and meritorious.

4th. In this instruction the court say, that evidence of the paternity of the children is inadmissible, as not being within the issue. It is quite clear, however, that a distinct issue on this subject, could not have been framed. It would have been immaterial to the question to be tried, though the proof tends to maintain the affirmative of some of the issues. It is a circumstance conducing to the great object of show-



ing an imposition upon the testator, and consequently was admissible. *Dietrick vs. Dietrick*, 5 Serg. and Rawle. 207.

The issue need never set out all the circumstances, necessary to establish the fact, to which they tend. The issue points to the result, and all the circumstances which may fairly conduct the mind to the result aimed at, are relevant and admissible in evidence.

5th. The incapacity of the children to take the bounty intended for them by the testator, is considered a material circumstance, as going to show, that by imposition, or fraud, or mental imbecility, the object of the testator was likely to be frustrated, and a direction given to the property, which, it is perfectly clear, he never contemplated. The evidence shows that the disposition of the estate, under all the circumstances, was not a rational one, and upon that ground was admissible. 4 *Stark. Ev.* 1708.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case comes up on appeal from the *Montgomery* County Court, on exceptions taken at the trial of issues sent to that court from the Orphans Court of the same county, upon a *caveat* against the admission to probat of certain instruments of writing, purporting to be the will of *Thomas Cramphin*, and the several codicils thereto.

There are three bills of exception, the two first to the rejection by the court of evidence offered on the part of the appellant to impeach those instruments, and the third to a series of instructions given by the court to the jury after the testimony was closed.

There is no question before us relating to the construction of the will. Nor is it a question before this court, whether the evidence offered, if true, would be sufficient to sustain the issues on the part of the appellant. That is not a subject for consideration on this appeal.

All that we are called upon to do, and can legitimately do, is to decide upon the competency of that evidence, and

the correctness of the instructions given to the jury, to do which it is necessary to see what the issues are.

They are eight in number.

The first, whether *Thomas Cramphin*, at the several times of signing the respective instruments of writing, was of a sound and disposing mind.

2. Whether, at the several times of signing them, he was urged thereto by such importunities of the appellees, or either of them, as he was too weak to resist, and under circumstances which left him not free to act in the disposition of his estate?

3. Whether his several signatures thereto were his own free and voluntary acts, with a knowledge of the contents of the several instruments, and without the exercise of an undue influence by the appellees, which in his then situation, and then imbecility of mind, prevented him from making a disposition of his property according to his own free will?

4. Whether the execution of the instruments was procured by fraud, and misrepresentation of the appellees, or any of them, or by others acting with the privity, and by the directions of them, or any of them?

5. Whether in the situation in which he was placed, and under the circumstances connected with the execution of the instruments, at the several times when they were executed by him, he was capable of knowing their contents, the manner in which they disposed of his estate, and of withholding his assent thereto?

6. Whether they are void by reason of undue influence, fraudulent devices, impositions, misrepresentations and deceits, practiced upon him by *Caroline Calvert*, or by her procurement, to induce him to execute them?

7. Whether they are void by reason of undue influence, fraudulent devices, and misrepresentations practiced upon him by the appellees, or any of them, to induce him to execute them?

8. Whether at any time subsequent to their execution, he was desirous of altering them, and whether he was prevented by the management, fraud, undue influence, or

importunities of *Caroline Calvert*, and *George Calvert*, or either of them, or others by their procurement?

The first relates to mental incapacity. The second to undue importunities by the *appellees*, or one of them. The third to undue influence by the *appellees*. The fifth to the capability of *Cramphin* to know the contents of the instruments, and to withhold his assent, under the circumstances connected with the execution of them. The fourth, sixth, seventh, and eighth, relate to undue and fraudulent practices. They are substantially the same as respects the *means* supposed to have been employed, but differ as to the persons employing them. The fourth looking to the *appellees*, or *some* of them, or to *others* acting with the *privity* and by the *directions* of *them*, or *some* of them. The sixth to *Caroline Calvert*, or *some others* by *her* procurement. The seventh to the *appellees*, or *some* of them; and the eighth to *Caroline Calvert*, and *George Calvert*, or *one* of them, or *others* by their procurement.

The questions then, that were presented to the jury for trial upon these issues, are questions of *Mental incapacity—Undue importunity—Undue influence—And of fraud.*

The third section of the first sub-ch. of the act of 1798, ch. 101, provides, "that no will, testament or codicil, shall be good and effectual for any purpose whatsoever, unless the person making the same, be, at the time of executing or acknowledging it, of sound and disposing mind, and capable of executing a valid deed or contract." These latter words, "and capable of executing a valid deed or contract," are of importance, in the investigation of every question touching the mental capacity of a testator. He who is not competent to execute a valid deed or contract, is, under the testamentary system of this State, incompetent to make a valid will or testament. It is not sufficient of itself, that a testator should be able to describe his feelings, or give correct answers to ordinary questions. His feelings at the moment may dictate his description of them, and the questions may prompt the answers, and yet he may be inadequate

to the transaction of other business, and unable to dispose of his estate with understanding and discretion.

The written law of this State furnishes the rule, by which the capacity of a testator is to be measured; and the inquiry must always be, whether, at the time of executing or acknowledging the will or testament, he was capable of executing a valid deed or contract; that is here, the standard by which the mental capacity of a testator is to be ascertained, and no *inferior grade of intellect will suffice*. That state of mental capacity is to be determined by the condition of the testator's mind, at the time of his executing or acknowledging the will or testament. For notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will or testament was made, as his incapacity before or after that time might have been the effect of a temporary cause. But for the purpose of shedding light upon the state of his mind, at the time the will or testament was made, evidence of its condition, and of his bodily imbecility, both before and after that period, may be produced. And a jury may, upon the whole evidence infer incompetency at the time of executing or acknowledging the will or testament, according to the character and cause of the entire incapacity proved; which may be established by proof of the conversations or actions, or declarations of the testator inconsistent with sanity, or of all of them taken together. The general maxim is, *semel furibundus semper furibundus præsumitur*. It is not of itself sufficient to avoid a will or testament, that its dispositions are imprudent, and not to be accounted for. But a will or testament may, by its provisions, furnish intrinsic evidence, involving it in suspicion, and *tending* to show the incapacity of the testator to make a disposition of his estate, with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty—such as a disposition of his whole estate, to the exclusion of near



and dear relations, having the strongest natural claims upon his affection: a wife and children for instance, or other near relations, without any apparent or known cause, which alone would be a suspicious circumstance, although not furnishing *per se* sufficient ground for setting aside the instrument.

This is but a single example, and not given as the only one, calculated to excite suspicion of the competency and freedom to act of a testator. The contents, therefore, of of the will or testament itself, and the manner in which it was written and executed, together with the nature and extent of the estate of the testator; his family and connexions; their condition and relative situation to him; the terms upon which he stood with them, and the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself, and the circumstances under which the will or testament was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of incapacity. And sometimes if taken altogether, may according to the degree of the injustice, absurdity, or unreasonableness of the dispositions attempted to be made of the property, tending to induce a reasonable doubt of the necessary sanity of the maker, and of his free agency uncontrolled by some undue influence, and the nature of the attending circumstances, and condition, and conduct, and character of those around him, justify a jury in deciding against the validity of the instrument, when its provisions, standing alone, unattended by such circumstances, or not coupled with them, would not be sufficient.

Fraud is a distinct head of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud: nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession or persuation, or flattery unaccompanied by fraud or deceit, and where the testator has

not been threatened or put in fear by the flatterer or persuader, or his power or dominion over him, will not have that effect. But there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have effect, (under circumstances) to avoid a will or testament. Such as the immoderate, persevering, and begging importunities and flattery of a wife who will take no denial, pressed upon an old and feeble man, which may be better imagined than described: or dominion obtained over the testator under the influence of fear, produced by threats, violence, or ill treatment. In neither of those instances, may there be any direct fraud; but an overruling influence upon the mind and feelings of a testator, according to the degree of his judgment and firmness.

To persuade or importune merely, is not to defraud, neither is it a fraud to threaten or ill treat, where there is no false impression, no deception practiced; but it is the moving cause of a pervading fear operating upon, and governing the will and actions of the person so put in fear, and controlling, and restraining the fair bias of his mind. Open violence is usually the opposite of fraudulent and deceitful practices; but not less destructive of the validity of a will or testament made under its influence. A testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all contradiction and control. 1 *Swinbourne on Wills*, 22. That degree therefore of importunity or undue influence, which deprives a testator of his free agency; which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it. *Kirloside vs. Harrison*, 1 *Eng. Eccles. Rep.* 336. 3 *Stark. Ev.* 4 part, 1707. Not in relation to the person alone, by whom it is so procured, but as to all others, who are so intended to be benefited by his undue influence.

That is the settled principle running through the books of authority, and is equally applied to cases of fraud as in *Bennet*,

*vs. Wade and others*, 2 *Atk. Rep.* 324. *Ex parte Fearen*, 5 *Ves.* 633. *Ex parte Wallop*, 4 *Br. Ch. Cas.* 90, and 4 *Ves.* 890. *Huguerin vs. Bosley*, 273. 7 *Bac. Ab.* 303, 304. If it were otherwise the guards thrown by law around testators, and the interest of those having just and natural claims upon them, would afford but a very feeble protection; as he who procures a will by fraud, misrepresentation, imposition, or undue influence, may readily procure the property to be given to others instead of reserving it directly to himself, No: but in the language of *Ld. Chief Justice Wilmot*, in *Bridegroom vs. Green*, “whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the persons imposed upon. 14 *Ves.* 289. And so in 2 *Bac. Ab.* (*Gwill. Ed.*) 303, 304. “If a man by occasion of some present fear or violence, or threatening of future evils, does at the same time or afterwards, by the same motive, make a will, it is void, not only as to him who puts him so in fear, but as to all others.

So that to avoid a will or testament, it is not necessary that threats or violence should have been practiced or resorted to, at the time of making it, but it is enough, if it was made at any time afterwards, under the general controlling and continuing influence of fear or dominion over the testator, by the person who so put him in fear; though not immediately exercised in regard to that particular instrument.

Fraud vitiates every thing with which it is connected. A will or testament therefore, which is obtained by fraud is void, and though fraud is never to be presumed, yet it is not necessary to prove it by positive and direct testimony. But being usually wrapt up in mystery, if well concerted, it is generally by circumstances only, by inductions of particulars, some of them often apparently trivial, that it can be brought to light and defeated. And in a question

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of fraud, any fact, no matter how slight, bearing at all on the point at issue, and not wholly irrelevant, may be admitted. But the circumstances, when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact, they are offered to establish.

It is a well settled rule of evidence, that remote and collateral facts and circumstances, not pertinent or relevant to the issue to be tried, are inadmissible in evidence. They are not only useless, but as they are calculated to distract the attention of the jury, they may be mischievous, and tend to prejudice and mislead them. But it is equally well settled, that facts and circumstances, tending to prove the issue, are admissible. Nothing that is pertinent or material to the issue joined, and tending to prove or disprove it, is inadmissible, if offered to be established by competent testimony, and it is the duty of the judge, in the exercise of a sound discretion, to discriminate between such facts as are merely collateral and foreign to the issue, and such as are connected with it.

It is sometimes difficult to ascertain, whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases, the court not clearly seeing that it is wholly foreign and irrelevant to the issue, and cannot be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it, that it will turn out to be pertinent and material; otherwise material and important testimony might frequently and injuriously be excluded, which it is the province of the court to guard against, when it may be done. As where the matter in issue depends upon a variety of facts and circumstances, to be proved in different ways, and by different witnesses, the whole of which cannot always be presented to the court at one view, the relevancy of any one of which, standing alone as a mere isolated fact, may not clearly appear, and could only be shown by a disclosure of the whole in



proof; and yet the rejection of it, have the effect to destroy the force of all the rest, when the whole taken together would be conclusive of the question. And when it does not clearly appear *a priori*, that a fact offered to be proved, is collateral and irrelevant, there is generally less mischief to be done or apprehended by admitting it, though it should afterwards turn out to be merely collateral, than by the rejection of the proof of a fact, only because standing alone, it does not plainly appear to be connected with the issue, but may, when connected with other facts and circumstances, become material and important. In short, no competent means of ascertaining the truth ought to be rejected; and all the surrounding facts of a transaction that can be established by competent evidence may be submitted to a jury, who are the judges of their force and effect. Applying these principles of law, and rules of evidence to the present case, the testimony offered at the trial on the part of the appellant, and rejected by the court, should have been suffered to go to the jury, as evidence of facts relevant to, and tending to prove the issues on her part.

It is contended on the part of the defendants, that the existence of the facts and circumstances offered to be proved, were not put in issue, and therefore properly rejected.

It is true, that they were not put in issue, nor was it necessary that they should have been; but they were offered to establish the facts that were put in issue—mental incapacity, importunity, undue influence, and fraud; and if relevant to either of those issues, they were proper to be submitted to the jury, no matter how slight they may be supposed to be, whether taken separately or collectively. In the plea of *per fraudem*, has it ever been held necessary to set out every minute circumstance, by the aid of which, the fraud alleged is proposed to be unveiled? The fraud imputed is one thing; the evidence by which it is to be established is another, and quite a different one.

The only questions here, then are, first, whether the tes-

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timony by which the facts were proposed to be proved, was competent evidence for that purpose: and secondly, whether those facts, if established, are relevant and bear upon the points in issue, or any of them.

The first of these questions is settled by the record; the first bill of exceptions stating that they were offered to be proved by competent and credible witnesses.

As to the second, it appears that *Caroline Calvert*, who is the reputed illegitimate daughter of *George Calvert* by a female slave, was not the wife of *Thomas Cramphin*, but his kept mistress: that at the time of his forming that illicit connexion with her, he was about seventy-five years of age; that, at that time, she was the slave of *George Calvert*, her reputed father, and continued in that condition until two days before the will was made, when she was emancipated by *Calvert*, *Cramphin* being then about eighty-five or eighty-six years old: that between the time when the connexion was formed, and the date of the will, she had the seven children named in the will, and one other who was then dead, and afterwards and before his death, which was some time in December, 1830, three others, who are still living, and not provided for, though born free, (being after their mother's emancipation,) and capable of taking; that the deed of emancipation of *Caroline Calvert*, the mother, contains a manumission of her seven children provided for in the will, to take effect *in futuro*, at certain specified periods, in relation to the males, on their attaining respectively the age of twenty-one years, and the females respectively the age of eighteen years; that at the same time a bill of sale was executed by *George Calvert* to *Caroline*, of the seven children, until they should respectively arrive, the males at the age of twenty-one, and the females at the age of eighteen years; that *George Calvert* is, by the will, made sole executor, and trustee in fee of all the property devised to the seven children, with a contingent devise in fee to *Caroline*, the mother, in the event of their being incapable of taking the benefit of the trust, from any cause whatsoever;

and that two codicils were afterwards executed, in the last of which *George Calvert* is made contingent devisee of the whole estate. All of which having gone to the jury, the appellant offered to give in evidence the declarations of this same *George Calvert*, (the reputed father of *Caroline*, and grand-father of the children, and who is described in the will as the confidential friend of the testator,) made a few days after the testator's death; "that he had promised him, (the testator,) to provide for the children, yet that he did not consider himself bound to do so, because he was convinced that they were not his children," which were rejected. Now, *Calvert* being executor and contingent devisee, and representing every interest under the will, and being also a defendant on record, evidence of any relevant declarations or admissions by him, adverse to the will, and bearing upon the issues or any of them, ought to have been admitted; the rule being, "that the admission of a party on record is always evidence, though he be but a trustee for another," with certain exceptions not applicable to this case. It does not fall within the principle excluding hearsay evidence; and with great deference we think, that his declarations offered to be proved are relevant, however trivial they may be considered standing alone. Seeing that he was the confidential friend of the deceased, who placed great reliance upon his judgment and fidelity, as manifested by the important trust confided to him, for it is a large estate, and the reputed grand-father of the children placed under his care, is it not clear that his promise, if made, had reference to the disposition of the will, and that they were conversing on that subject, at the time the promise was given? And may it not be, that this very old man, relying upon that promise, and the integrity and fidelity of his friend, was deceived into what he did, and would not have done, but for that deception, if, indeed, it had relation to the children intended to be provided for, for it does not clearly appear to which set of the children of *Caroline* it did relate; but suppose it related to the three children born after the will was

made, and not provided for, may it not be that the deceased wished and intended to make provision for them, but was prevented by the imposition and deception practiced upon him, if any such there was? and if so, if *Calvert* did make the imputed promise, intending to violate it, it was an imposition and deception practiced upon the old man. If the offer had been of evidence of an acknowledgment by *Calvert*, that he had forged the will, or extorted it by threats or violence, there would have been no difficulty about it. Here, indeed, the offer was of evidence of a circumstance only; but though a mere circumstance, it was of *one tending* to prove the issue of fraud, and which, when connected with others, might be found to be an important link in the chain.

As to the several other offers stated in the first bill of exceptions, we think they were all and each of them, evidence pertinent and proper to have gone to the jury, as parts of the surrounding circumstances of the transaction, and tending to elucidate the matter in dispute, and ought to have been admitted.

In questions of this kind, the condition and character and conduct of the persons drawn around the testator, are of importance to be inquired into, in reference to his family and relations, his own situation, the extent and nature of his estate, the character of the dispositions of the will, and to the persons to whom the property is given.

Here the condition of *Caroline Calvert* was that of a colored slave, the kept mistress of the testator, in which condition she continued until two days before the date of the will, with a view to which, the deed of emancipation would seem to have been executed, when *Thomas Cramphin* was eighty-five or eighty-six years old; the estate is a large one, and the whole of it given to her and her children named in the will, with a contingent devise to *George Calvert*, to the exclusion of all others. Now, seeing all this, if it be true that *Caroline Calvert* was, before she had formed the illicit connexion with *Cramphin*, and up to the time of that con-



nexion, a woman of lewd and dissolute habits, a common prostitute, which was offered to be proved; and if after that time continuing to live with him as his mistress to the day of his death, and inducing him to confide in her fidelity to him, she continued, unknown to him, to indulge in secret intrigues and lewd intercourse with other persons, which was also proposed to be proved, does it not throw a shade of suspicion over the will, and tend to shed light upon the subject in dispute? If she was a woman of such character and habits, and did so abuse his confidence, it was an imposition, a deception practiced upon that old man, calculated to induce a suspicion, that the entire disposition of his large property to her and to her children, was not the unbiased act of his mind. It may be a small circumstance, but in such a case, there is no circumstance having any bearing upon the question, that is too minute to be admitted.

It is apparent upon the face of the will, that the deceased, *Thomas Cramplin*, supposed the seven children of *Caroline Calvert*, therein provided for, were his—and if in fact they were not his, but the spurious issue of her secret and lewd amours with other persons, and he was by reason of old age, debility and infirmity, physically incapable of begetting a child, and she did falsely, artfully and deceitfully, and by her undue and overweening influence and dominion over his mind, impose them upon him as his children, and if *George Calvert*, believing them not to be his children, did aid and abet the false and deceitful imposition, (all of which was tendered to be proved) it was an imposition and deception practiced upon him, closely connected with, and strongly bearing upon the matter in controversy. Under the influence of that false impression alone, and by no independent motive of affection, he may have been induced to give his estate to *Caroline Calvert* and her seven children named in the will; which, but for such impression so made, he might not have done. In *Ex parte Wallop*, 4 Bro. Cases, 90, and 4 Ves. 809, where, upon application for a writ *de ventre inspiciendo*, it appeared that a woman who had lived

with a man named *Fellowes*, had made him believe that she had been brought to bed of several children, which he was weak enough to suppose were his, and gave legacies to them, as her children by him, it was held that they were not entitled. And *Clark and others vs. Fisher and others*, 1 *Paige's Rep.* 171, when the widow of the deceased procured from the alms-house a child, and imposed upon him as his niece, the child of a deceased brother, to whom he gave a part of his estate, the will was set aside. As to the admissibility of proof relative to the question of paternity, *vide* 4 *Term. Rep.* 350, and 6 *Term. Rep.* 330, and 2 *Stark. Ev.* 4 part, 219.

The cases in 1 *Ves. and Beam.* 422, and in 1 *Merivale's Rep.* 141, cited to show, that evidence in relation to the paternity of these children could not be received, do not apply to this. In those cases no question arose concerning the due execution and the validity of the will, which had been established; but they were merely questions of construction, and identity, and of the sufficiency of description of the persons claiming under the will.

As to the second bill of exception, the whole of the evidence that had been before rejected, was again offered, on the ground that all objection to it, if any existed, had been waived by the statements of the opening counsel on either side, which is again insisted upon here. We cannot assent to the proposition, that the statement by counsel of what they expect to prove, in opposition to the statement on the other side, is sufficient to lay a foundation for letting in testimony otherwise inadmissible. But this being the same evidence that we have endeavored to show, should before have been submitted to the jury; when offered again in an embodied and more imposing form, we think it ought not to have been rejected.

The instructions given by the court to the jury empanelled to try the issues, which form the subject of the third exception, remain to be considered. They are seven in number, and were given on the prayers of the counsel for

the defendants, most of them incorporating modifications prayed by the counsel on the part of the appellant. Of these are the first and second instructions, in both of which we concur.

The first as so modified, being a direction to the jury, that if any part or clause of the will was first suggested by any other person, and adopted by the testator, it was necessary that such suggestion and adoption should not have been the result of his incapacity or weakness of mind, nor of fraud, circumvention or undue influence, upon which, it was for them to decide from all the facts and circumstances in evidence. And the second being substantially and practically a direction to the jury, that to invalidate the will, on the ground of fraud or undue influence, it was necessary that it should have been induced by fraud, circumvention, deception, imposition, or undue influence operating upon, and controlling the testator at the time it was executed; of which, and in what degree he was influenced and controlled, it was for them to judge from all the facts and circumstances in evidence; and that it was not necessary that such fraud or undue influence should have been immediately and directly exerted at the particular time at which the will was made; and it is the only construction that can fairly be given to it.

The *third* and *seventh* instructions incorporating the modifications proposed on the part of the counsel for the appellant, would have been proper if they had stopped there. But the addition by the court to each of them, that *undue influence* implied *fraudulent practices*, was wrong; seeing that there may be overweening and controlling undue influence without fraud, as has been before remarked, and attempted to be shewn.

The *sixth* instruction, including the addition prayed by the counsel for the appellant, does not, as has been supposed, look to the immediate and direct resort to, and exertion of, fraudulent suggestions and undue influence at the time

the will was made, nor to the exercise of it in the procurement of that particular instrument, but to a general controlling undue influence and dominion, operating upon the testator at that time, and inducing its execution, which so far is right and proper. But the same instruction limits the inquiry of the jury to the fraudulent suggestions, or undue influence of *George and Caroline Calvert*, or one of them, and of the other devisees, or some of them, and is applied to the whole of the first seven issues; whereas there are some to which it cannot relate. And if the will was the result of the fraudulent suggestions or undue influence of others, the effect would, under the fourth and sixth issues, be the same. It is, therefore, as so limited and applied, wrong.

We cannot concur in that part of the fourth instruction, in which evidence to prove or disprove the paternity of the seven children of *Caroline Calvert*, who are provided for in the will, is declared to be irrelevant to the issues, or any of them. The question, whether they were or not the children of *Cramphin*, was not put in issue; but if they were not his children, it was under the nature and circumstances of the case, a fact relevant to, and tending to prove a matter that was put in issue, as we have before endeavored to show.

In the *fifth* instruction to the jury, that whether any of the devisees named in the papers purporting to be the last will and testament, and codicils thereto, of *Thomas Cramphin*, have or have not a legal capacity to take under said instruments, is wholly irrelevant to the issues or any of them; the court, we think erred, and should have given the *fifth* additional instruction prayed by the counsel on the part of the appellant.

It is true, that the construction of these instruments, and whether the children named are capable of taking under them, are questions not put in issue. But the question, whether they were improperly procured to be executed is in issue.



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*Caroline Calvert* is, by the original will, made contingent devisee of the whole estate; she has still living, three other children, born afterwards, who by codicil or another will might have been provided for—yet no provision was made in their favor, though they were as much entitled to his bounty as the seven who are named—and no reason is shown why they were not afterwards provided for, but left penniless. If, after their birth, the will had been altered, and a part of the estate given to them, to that extent would her interest have been affected; for they were born free and capable of taking, being subsequent to her emancipation—whereas, in the event of the others being incompetent to take, the entire estate was by the will to go to her. She was interested, therefore, in both the *will* and their manumission being made as they were, and also in their being no subsequent alteration in favor of the three children born afterwards—which, looking to all the other surrounding circumstances of the transaction, is surely one having a bearing upon the question in controversy, and proper to be presented in argument to the jury, under the directions of the court. Besides, the same feeling that induced the testator to give such an estate to the children, born and living at the date of the will, if it was his own free and unbiased act, would, as it would seem, if left to himself, have prompted him to make some provision for those who were born afterwards.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Clagett, *et al.* vs. Salmon.—1833.

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**ELIZABETH CLAGETT, *et al.* vs. CHARLES SALMON.**  
*December, 1833.*

**C** died, and an inventory of his estate was returned by his administratrix to the Orphans Court, in 1816, who passed an account termed a final account in 1823. In 1827, the administratrix and several of the children of the intestate united in a mortgage of property mentioned in the inventory—**HELD**, that the rights of creditors of the deceased not being in controversy, the mortgagors could not contend that this property was in the hands of the administratrix for distribution, and from the lapse of time, a court of equity would presume, in support of the mortgage, that the intestate's debts had been paid, and distribution made.

The act of 1763, *ch.* 13, relates wholly to gifts of negroes and slaves, and has nothing to do with mortgages, or other assurances for valuable consideration.

By the act of 1729, *ch.* 8, a mortgage of personal property, of which the mortgagor retains possession, is void, so far as the rights of creditors are concerned, unless acknowledged and recorded as therein prescribed, but although not recorded at all, or not recorded in time, it is still legally effectual against the mortgagor and all claiming under him.

Several persons united in a mortgage of the property, reciting that **C**, one of the parties, had lately commenced, and intended pursuing the business of a merchant, and that the mortgagee had agreed to give him credit and become his surety and endorser to the amount of \$10,000 in the prosecution of his business, and the mortgage also contained a proviso to indemnify the mortgagee from all advances, &c. which he shall "incur or make on account of the said **C**, not to exceed at any one time the sum of \$10,000." **HELD**, that the sureties of **C** were not discharged because the mortgagee did not limit his advances to the sum of \$10,000, and that the object of that stipulation was merely to confine their responsibility within that sum, and not to prevent the mortgagee giving **C** further credit.

**A** mortgagee, before the period at which he has a right to foreclose or sell, the subject mortgaged, upon a bill charging that the mortgagors contemplate and design to sell and dispose of the mortgaged property, with a view of defeating his lien, or that he is apprehensive the defendants will sell, dispose of, conceal, or remove the whole of the personal property before the same could be made responsible to him for the satisfaction of his claim, may obtain an injunction to preserve the property, and prevent it from being removed before it could be made responsible for his claim according to the terms of the mortgage, and the Chancellor may pass a final decree upon such a bill in conformity with the principles, and for the objects, above mentioned.

Where a complainant applies to a Court of Chancery for an injunction to preserve property mortgaged to him, from waste, destruction or removal, which he has sufficient reason to apprehend will occur before he has a

right to proceed upon his mortgage for a sale or foreclosure, he is entitled to costs, upon the final decision of his cause.

At law, if two persons be bound jointly and severally, and the obligee releases one of them, both are discharged, yet equity will not give a release or operation beyond the intention of the parties, and the justice of the case. Where time is given by contract to a principal for the payment of a debt, without the consent of a surety, he will be discharged because he is only bound by the terms of his contract, and any variation of those terms, without his consent, will operate to discharge him.

A creditor may stipulate with his debtor, giving him time for the payment of his debts, and in the same contract declare, that such forbearance shall not affect the creditor's rights against the debtor's sureties. By the reservation of the remedy against the sureties in the contract for time, the debtor tacitly consents to forego and waive the benefit of such contract, in case the creditor should afterwards find it necessary to resort to the sureties for the full and complete extinguishment of his debt.

Such a contract between the creditor and principal debtor is not absolute, but conditional and contingent; and in effect, the debtor being at all times responsible to his sureties in case they are proceeded against by the creditor, they cannot claim to be discharged from liability to such creditor.

#### APPEAL from the Court of Chancery.

A statement of this case was given by the Judge who delivered the opinion of this court, as follows, viz :

The bill states that *Thomas Clagett*, one of the defendants, having a short time previous to the 22d of September, 1827, engaged in business in the city of *Baltimore*, as a merchant, the complainant agreed and undertook to give credit to, and to become surety and endorser on notes drawn by said *Clagett*, in the prosecution of his said business to the amount of \$10,000; and the said *Thomas Clagett*, and his mother, and several of his brothers, with a view to indemnify and save him harmless, executed in due form of law, a deed of mortgage, bearing date on the 22d of September, in the year aforesaid, whereby they conveyed to him all their right and title, in and to a tract of land therein mentioned; and also, all their right, title and interest, in and to the personal estate of which *William Clagett* died possessed, consisting of negroes and other personal property, then, and still in the possession of two of the mortgagors. The bill further charges, that in pursuance of said

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agreement, he did give credit to said *Thomas Clagett* for goods sold, and money loaned, and did endorse notes drawn by him, to the amount of \$16,488 34. That *William Clagett* died possessed of a large personal estate; that *Eli-zabeth Clagett* administered thereon, made a final settlement of said estate, and held in her hands, subject to distribution, a considerable amount of property, which had not been paid to the different representatives, although distribution had been made by the authority of the Orphans Court; but that she and *Edmund Clagett*, one of the defendants, had always been in possession of said property, using and employing the same, for the common benefit of themselves and the other representatives of the said *William Clagett*. The complainant states that he does not know the personal property embraced by the deed of mortgage, as there was no schedule or specification thereof ever made, and that he has reason to believe, and therefore charges that the defendants contemplate and design to sell and dispose of part or the whole of said property, with a view of defeating his lien on the same. That a decree for the sale of said property, according to the terms of the mortgage, cannot be had until after the 1st of October, 1830, and that he is apprehensive the defendants will, before that period, sell, dispose of, conceal or remove the whole or a part of said personal property, and thus jeopard a part of his claim against said *Thomas Clagett*. The bill further charges that certain goods, wares and merchandize, and debts, had been transferred by *Thomas Clagett*, and certain persons acting as his trustees to complainant, the proceeds of which property he was to apply to the payment of the debts of said *Clagett* due to divers individuals, and his own claim so far as it would go towards the same, and states that said property will be wholly inadequate for such purpose, and that a very large balance will be still due to him. The bill then prays for a discovery of the personal property intended to be conveyed by the mortgage, and an injunction prohibiting and restraining the defendants "from selling, disposing of, con-



cealing or removing the whole, or any part of the said personal property," until he could, according to the provisions of the said deed of mortgage, pray for a foreclosure and sale of the property included therein. The deed of mortgage referred to in the bill contains the following recital: "Whereas, the said *Thomas Clagett*, one of the parties of the first part of this deed, hath lately commenced, and intends pursuing the business of a merchant in the city of *Baltimore*; and whereas, the said *Charles Salmon* hath agreed to give credit to, and to become surety and endorser on notes drawn by the said *Thomas Clagett*, in the prosecution of his said business, to the amount of \$10,000 current money, and the said *Elizabeth Clagett*, *Edmund Clagett*, *Samuel A. Clagett*, *Richard H. Clagett*, *John W. Clagett*, and *Thomas Clagett*, to indemnify and save harmless the said *Charles Salmon* for any advances he may hereafter make, or may have heretofore made for, or to the said *Thomas Clagett*; and also, for any endorsements which the said *Charles Salmon* may have heretofore, or shall hereafter execute for, or on account of the said *Thomas Clagett*, have agreed to execute and deliver these presents." The deed of mortgage then conveys all the right, title, interest and estate of the mortgagors, in and to some real estate therein mentioned, and also, all the personal estate of which the said *William Clagett* died possessed, consisting of certain negroes, horses and cattle, then in the possession of *Elizabeth Clagett* and *Edmund Clagett*, with a proviso, that if the said *Thomas Clagett* "shall well and truly pay, re-pay, and satisfy the said *Charles Salmon* for all advances of goods, or loans of money which the said *Charles Salmon* may have heretofore made, or shall, before the first of October, 1830, make to the said *Thomas Clagett*; and shall also indemnify and save harmless the said *Charles Salmon*, and against all endorsements which the said *Charles Salmon* may execute before the first day of October, in the year 1830; and shall also indemnify the said *Charles Salmon*, from and against all bills, bonds or notes which he shall sign or seal, as security for the said

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*Thomas Clagett*, before the first day of October, 1830, the said advances, loans, endorsements and other liabilities, which the said *Charles Salmon* shall incur or make, on account of the said *Thomas Clagett*, not to exceed at any one time the sum of \$10,000 current money, then and from thenceforth these presents, and every matter and thing herein contained, to the contrary in any wise notwithstanding." On the 19th of May, 1828, *Thomas Clagett* finding himself in failing circumstances, and unable to sustain his credit, conveyed all and singular his stock of goods, wares and merchandize, effects and property of every description belonging to him, as therein specified, and all debts, sums of money and claims due, or owing, and payable or belonging to him, to *Henry Beadle* and *Daniel Cobb*, in trust, for the benefit of the creditors of the said *Thomas Clagett*, and on the 26th of May, 1828, the said trustees, *Thomas Clagett* and the appellee, entered into the following agreement:

"We, the undersigned, acting as the representatives of the creditors of *Thomas Clagett* of the one part, and *Charles Salmon* of the other part, have agreed and do hereby agree to the following arrangement, and bind our respective principals to comply with and fulfil the same, viz: 1. A correct inventory of the goods shall be taken by two persons appointed by each party, at the cost, or such prices as the same have been invoiced at by the said *Thomas Clagett*, provided they have not been set down at more than the actual cost of the same. 2. The books, notes, and all other evidences of debt, shall be forthwith put into the hands of *Charles Salmon*, who shall use all due diligence in the collection of the same. All the personal and real property of the said *Thomas Clagett*, (excepting clothing and watch) shall in like manner, and in good faith be put in the hands of the said *Charles Salmon*, and valued by disinterested persons, and received by said *Salmon* at such valuation. 3. The said *Salmon* shall receive the goods when invoiced as above, at the gross amount of the same, together with all the moneys received on account of debts, notes, book ac-

counts, and place the same to the credit of the estate. 4. The said *Salmon* shall be responsible for the legal debts of said *Clagett*, to the amount of \$39,500, including his own claim and borrowed money, and retain a mortgage which he now holds, to indemnify him, for any deficiencies which may exist after collecting the debts, and taking the goods at their invoiced prices, if any deficiency should then appear. 5. One gentleman shall be appointed by each party to examine every debt, and determine whether it shall be classed as borrowed money, or other legal debts, and should they disagree they shall have power to appoint an umpire, whose decision shall be binding. 6. The said *Salmon* shall give his notes severally to the creditors, at nine months without interest, or fifteen months, with interest added after nine months, at his discretion, for such portion as they shall decide to be legal debts, and his notes at ninety days, with interest, for such portion as they shall class as borrowed money. 7. Should the effects of *Thomas Clagett* not realize the aforesaid sum of \$39,500, the said *Salmon* shall not foreclose the mortgage he now holds, until after the expiration of two years from this date. 8. After this agreement has been executed by the respective parties to it, it is understood that responsibilities to and from *Thomas Clagett* shall be annulled so far as the persons we severally represent, may be concerned ; also to exonerate the family of *Thomas Clagett* from the payment of such notes as may be signed or endorsed by them, and held by said *Salmon*, not interfering with, or invalidating their liability in the mortgage held by said *Salmon*. It is expressly understood that nothing contained in this agreement shall in any manner affect the mortgage heretofore given by *Thomas Clagett* and his family, to indemnify said *Salmon* against certain risks and losses, excepting so far as to delay foreclosing said mortgage for two years from the date hereof.”

In execution of this agreement, the appellee obtained possession of goods and effects of considerable value, according to the proof in the cause.

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The answers deny that the deed of mortgage conveyed any right or title to any part of the personal estate. They insist that *Richard H. Clagett* was under age at the date of the deed, and that the agreement between the trustees, *Thomas Clagett* and *Charles Salmon*, released the mortgagors from any liability to the complainant, and that there are other representatives of *William Clagett*, whose rights are impaired by the injunction. A general replication was entered, and commission issued. The cause was set down for hearing, and the Chancellor decreed "that the said defendants be, and they are hereby restrained and enjoined, as prayed by the said bill of complaint, from selling, concealing or removing beyond the jurisdiction of this court, the negroes, &c. in the mortgage mentioned, or any other of the said mortgaged property in the possession of the said defendants, or any of them, at the time the said injunction heretofore granted, was served on them, until the further order of this court on any bill which may be filed by the said plaintiff to foreclose the said mortgage, or any bill that may be filed by the said defendants to redeem the said property. And as to the said *Richard H. Clagett*, the injunction was thereby dissolved, and the bill, as to him, dismissed with costs. And it was further decreed, that the defendants, other than the said *Richard H. Clagett* pay all the costs of this suit, not heretofore ordered to be paid by the plaintiff."

BLAND, Chancellor, (December term, 1830,) delivered the following opinion :

The proofs substantially sustain the allegations of the bill, and leaving none of the facts of doubtful credibility, there is nothing to be determined but the principles of equity, properly arising out of those established facts. The defendants contend that the mortgage is void upon its face, to the extent of the personalty at least, as having been made by one who is incompetent so to dispose of it; and it is also a nullity against one of the grantors, who was an infant



when he signed it; and against all of them, because it has not the requisite solemnity of such a contract, that of having been recorded in time; and further, that there is an implied contract attendant upon this mortgage, which imposes obligations upon *Salmon* in favor of the sureties of *Thomas Clagett*, which *Salmon* has in various ways so disregarded as to have released those sureties from the incumbrance of the mortgage. In answer to which it is denied that any act of *Salmon's*, as here shown, can be considered as having that operation; and moreover, it is urged that all the obligations of the implied contract have been carefully and effectually preserved for the benefit of these sureties, so that they can have no ground to complain of any of *Salmon's* acts, whatever they may have been. Then passing from the subject of the suit to the suit itself, it is objected, that the plaintiff can have no relief in this case, because the suit has been instituted too soon; and because to perpetuate the injunction merely, would be to lay the defendants subject to the caprice of the plaintiff, without leaving them any means of extricating themselves. These are the matters to be considered.

In taking the position that the mortgage is absolutely void, because the grantor as administratrix had no power to make such a deed, I understood the defendants as making no such objection to it, as a conveyance of the realty therein mentioned; and as also assuming the ground, that unless it can avail the plaintiff as a deed proceeding from the administratrix, who alone, among the grantors, had power thus to sell or pledge the personalty, it must fail as to that altogether. I shall, therefore, as regards this position, consider this deed as embracing nothing more than the property therein specified, as the assets which *Elizabeth Clagett* held as administratrix of the late *William Clagett*. An executor or administrator is in equity regarded as a trustee, but then in equity as well as at law, an administrator is considered in general, as the absolute owner of the assets of the deceased, whether they be legal or equitable, or *choses in*

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*action.* The exercise of the powers of unqualified ownership, to a certain extent, is indispensably necessary to enable him to execute his trust, and to discharge his duty to advantage; and also to prevent the general inconvenience of implicating and entangling third persons in inquiries, as to the application he may propose to make of the money produced by the conversion of the assets. A fair purchaser for a valuable consideration, is in no way bound to see to the application of the purchase money by an executor. He can have no means of knowing the debts of the deceased, and is therefore absolved from all inquiry respecting them. Upon those general principles, not even a creditor of the deceased is permitted to follow the assets so aliened; for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets; and a specific or residuary legatee can stand upon no higher ground in this respect than a creditor. 1 *Atk.* 463. 14 *Ves.* 359. 17 *Ves.* 154. 4 *Mad.* 357. The only qualification of this general rule is, where the transaction is in some way tainted by fraud. Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor or administrator, is responsible to those entitled under the will, or as creditors, or next of kin, if he be a party to the breach of trust. What will amount to a fraud of this kind, must depend upon the circumstances of the case. It is said that, generally speaking, he does not become a party to the breach of trust by buying, or receiving as a pledge for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *prima facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is *prima facie* inconsistent with the duty of an executor. 4 *Mad.* 357.

In this case, the administratrix has not sold or pledged the assets of her intestate, for money advanced to her by *Salmon*; but she has mortgaged them to indemnify *Salmon* for any loss he may sustain, in the manner described, from *Thomas Clagett*. *Salmon* has advanced no money to this administratrix, which she might or might not have applied to the uses, and for the benefit of the estate of her intestate. On the contrary, this mortgage is, on the part of the administratrix, a voluntary pledge of the assets of her intestate, to insure the payment of the debt of another. It is upon the face of it, and in terms, an application of the assets, in a manner wholly inconsistent with her duty as administratrix, and *Salmon*, as the grantee, is a party to this breach of trust. This mortgage must, therefore, be considered as at least *prima facie* in equity, as a fraudulent application of the assets, as against all those who have a claim upon them as creditors, or next of kin of the intestate.

But there is here no creditor, nor any one of the next of kin of the deceased, who makes any objection to this mortgage, or asks to have it set aside on the ground of fraud to let in his claim. There is no such person now here attempting to follow these assets for any such purpose—and if there be any one who has an interest in the personal property so pledged, independently of, and superior to those bound by, or who claim under this deed, they are not now before this court; and it is very clear, that none of these defendants can be suffered to impugn their own deed for the benefit of others, not parties to this suit. But administration was granted to this defendant, *Elizabeth*, so long ago as the year 1816, and she executed this mortgage on the 22d September, 1827, then having this property in her possession. It is not intimated that there are any outstanding debts due from the intestate; and if these, his children, who are here as defendants, had any claim as distributees, they have made none, and therefore must be presumed to have been satisfied. But supposing they had not received any satisfaction for their respective distributive shares, they



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have, by this their own deed, completely bound up and mortgaged the whole of their interest, whatever it may be, to its utmost extent. 17 Ves. 170.

*Richard H. Clagett*, by his answer, relies on the fact of his having been an infant at the time he signed the mortgage, as an ample defence for himself. The fact of his infancy is fully established by the proof. He, however, asks for himself no more than to be discharged from the obligatory force of the deed, and to have it treated as a nullity so far as it is made the foundation of any claim against him. But he makes no claim of his distributive share of the intestate's estate in any form. He does not allege that he has not been satisfied by this administratrix to the full amount of his distributive share. So far from making any such assertion, of his own individual rights in opposition to this deed, he plants his defence against it, apart from the allegation of his infancy, in all respects upon the same ground taken by all the other defendants; and consequently, although he cannot, because of his infancy, be bound by the mortgage as his deed, yet, having by his own answer failed to assert his right when thus implicated and called on to do so, he must be considered as having waived all objection to this mortgage, on the ground of its having made any improper disposition of his interest, inconsistent with the office and duty of the administratrix. Hence, as *Richard H. Clagett* for this reason, can on the one hand, claim no protection of his interests in this suit, so on the other, because of his infancy there can be no decree against him. I shall therefore dismiss the bill as to him.

It has been urged, however, that although this administratrix might have had sufficient power so to dispose of the assets, or that the questionable disposition thus made of them had been fully affirmed by the distributees; yet that the instrument by which it was proposed to be effected, not having been recorded, is in that respect deficient in one of those solemnities necessary to constitute a valid mortgage. By the common law, to make a valid deed, certain forms and



ceremonies are indispensably necessary in that way to manifest the deliberate will of the contracting parties; and it is admitted that this mortgage has all the common law requisites of a binding deed. But the legislative enactments of *Maryland*, which require deeds to be recorded, like those of *England*, requiring enrollment, are universally admitted to have been intended to preserve the evidence of the contract, and to prevent the practice of fraud upon creditors and purchasers. The object was to furnish the means of notice, and a protection to innocent third persons, not parties to the contract. It never has been held, that those laws altered any principle of the common law, or required any thing in addition to the common law solemnities, as a necessary constituent of a deed, to secure the payment of moneys, as between the parties to it. Hence, a deed of this kind, as between the parties themselves, has always been deemed as valid and effectual, without recording, as with it. And as to creditors and purchasers, if they have by any other means obtained that notice, which it was the design of recording to give, even they are not allowed to object to the validity and operation of the deed on that account. But in no instance has any of the immediate parties to such a deed ever been suffered to object, that it should not be enforced, because it had not been recorded in time; such an objection can only come from a creditor, a purchaser, or some innocent third person, whose interests are affected by the deed. Here there is no such third person before the court; the objection is made by some of the parties to the mortgage itself, which cannot be permitted; since as to them, the deed is valid by the common law, and in no way affected, as a security for money, by the acts of assembly requiring such instrument to be recorded. There is then nothing in this position taken against the validity of the mortgage. 2 *Inst.* 674. 1 *Lord Raymond*, 388. 1 *Salk.* 199. 1 *Cran.* 240. 6 *Harr. and Johns.* 63.

It appears that *Charles Salmon* had agreed to lend his credit to *Thomas Clagett*, by selling him goods, to be paid

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for at some future day, by lending him money, and by becoming his surety in the way of lending or endorsing notes. Hence, in respect to that agreement, they stand towards each other simply, as creditor and debtor. But for the purpose of securing *Salmon* against any loss he might sustain by the credit so given, *Thomas Clagett* with *Elizabeth Clagett* and others, mortgaged their property to *Salmon*; and consequently, to the extent of *Salmon's* claim for indemnity under the mortgage, he must be regarded as the creditor; *Thomas Clagett*, as the principal debtor, and *Elizabeth Clagett*, with the other mortgagors, as his sureties. This is the situation in which the parties have been placed by the mortgage itself; and this suit brings them here in the same relation towards each other. The dealings between *Salmon* and *Thomas Clagett* are no otherwise of any importance in this case, than as showing the consideration on which *Salmon's* claim is founded, and that it is of some amount; or how far any of *Salmon's* conduct, in relation to those dealings, may have impaired that implied contract, in virtue of which the sureties of *Thomas Clagett* have a right to have the impending loss averted from them, by a bill *quia timet*; or to take the place of *Salmon* in order to obtain re-imbursement.

It is universally admitted, wherever the relation of principal debtor and surety subsists, that if the surety pays the whole debt, he has a right to be put into the place of the creditor as to all his remedies for the recovery of the debt. This right of subrogation is recognized in courts of common law, as founded upon an implied contract; and in chancery as resting upon such a contract, or as an equity properly belonging to the case, or as based upon a principle of natural justice, which springs into existence immediately that the debt falls due, and the surety becomes liable to be called on for payment. This implied contract binds the creditor, if required by bill in equity at the instance of the surety, to sue immediately for the recovery of his debt; or if the debt has been wholly paid by the surety, to

transfer to him all his securities, as well those which he held at the time the surety became bound, as those which he may have since acquired, even without the privity or knowledge of the surety, such as a judgment recovered against the principal, or a mortgage by way of collateral security. The surety, in such case has a right to an assignment of all the creditor's securities, to enable him to proceed immediately in the same manner, as the creditor might have done to obtain satisfaction or reimbursement. And therefore, if the creditor being competent to contract, has by express agreement enlarged the day of payment; or has by his acts increased the peril of the surety; or has parted with any of his securities; or has in any other manner altered or impaired the obligation of the implied contract, (which for the protection of the surety is always associated with the express contract as its inseparable incident,) then the surety is discharged; upon the ground that all such acts are against the faith of the implied contract, by virtue of which the surety had precisely the same right the creditor had, and must be allowed to take his place in all respects; and also upon the ground that the creditor is a trustee of his security; that is, the bond, judgment, execution, or the like for all parties interested in it, or who may ultimately resort to it for relief. 1 *Cha. Cas.* 70. 1 *Vern.* 190. 2 *Vern.* 608. 2 *Bro. C. C.* 579. 3 *Bro. C. C.* 1. 2 *Ves. Jr.* 540. 10 *Ves.* 420. 11 *Ves.* 22. 14 *Ves.* 164. 3 *Merv.* 272, 570. 2 *Swan.* 187. *Selw. N.P.* 86, no. 27. 1 *Bos. and Pul.* 652. 2 *Ib.* 61. 2 *Rand.* 529. *Gilm.* 149. 6 *Mun.* 6. 2 *De Saus.* 230, 389. 1 *McCord*, 116, 297. 5 *Harr. and Johns.* 242. 7 *Ib.* 35. 2 *Harr. and Gill*, 90. 3 *Wheat.* 520. 1 *Poth. Obl.* 406.

It is believed, that the obligation of private contracts has been regarded by all civilized people, as of the highest and most inviolable sanctity; and according to our fundamental law, there is no power in the land by which the obligation of such contracts can be in any manner lessened or impaired. Here, and as to this point, it is not pretended

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that the mortgage itself has been, or can be in any way, stripped of a single atom of its own proper, legal or equitable obligatory force. But those defendants who stand here as sureties, referring to that implied contract, the incident of the mortgage, to the full benefit to which they are entitled, urge that its obligation has been materially impaired to their prejudice; and therefore, that they are discharged. They allege, that its obligation has been altered, diminished or destroyed, by the circumstance of *Salmon* having increased their peril, by giving to *Thomas Clagett* credit for an amount greater than that specified in the deed; and by having by an express agreement with *Thomas Clagett*, after the debt became due, enlarged the time of payment, and also by his having released a security he had procured, by means of which he might, for aught that appears, have obtained a complete satisfaction of his debt.

On behalf of the sureties of *Thomas Clagett* it was contended, that their guaranty of indemnity was in all respects a limited one, by which they not only intended that they themselves should not be responsible beyond a specified amount; but that *Thomas Clagett* should not be credited for more than that amount by *Salmon*; because by so involving him beyond the specified sum, his situation would be rendered more precarious, and they would thereby be more likely to be damnified. If that was the intention of these sureties, they certainly have not so distinctly expressed themselves by this mortgage. That deed evidently purports to be a continuing guaranty, not merely until the sureties should think proper to put an end to it, by giving notice to *Salmon* that it should be no longer continued, but its duration forms an express part of the contract itself; it was to endure until the 1st of October, 1830, and no longer; and it was not to exceed in amount the sum of \$10,000; thus limiting the extent of the liability of the sureties, without making the slightest allusion to the extent of the credit which *Thomas Clagett* might obtain from *Salmon*, or any one else; or to the scope of his business; or



to the perils and risks in which he might be involved by the wide range of his commercial concerns. The sense, and substance of this mortgage, considered as a guaranty, comes to this, that these sureties thereby undertook to sustain the credit of *Thomas Clagett*, to an amount not exceeding \$10,000, continually, from that time until the first of October, 1830. It is therefore of no importance, as regards this mortgage, what may be the amount of the debt due from *Thomas Clagett* to *Salmon* beyond that sum; since the mortgage covers no more than \$10,000; nor is it of any consequence when, within the specified period of time, the credit was given by *Salmon* to *Thomas Clagett*, so it was given in the manner prescribed in the deed. The proofs clearly establish the fact, that the liability from *Thomas Clagett* to *Salmon*, was incurred in the mode specified by the deed; and therefore, I am opinion, there is no foundation for this objection. 3 *Wheat*. 148. 12 *East*. 227.

It has also been insisted that the credit has been extended, and the time of payment enlarged by the agreement of the 26th May, 1828. Whether that can be so considered must depend upon what shall be deemed the true meaning of the mortgage. I take the sense of that contract to be, that *Salmon*, upon the faith of the property so pledged to him, agreed to lend his credit to *Thomas Clagett* during a certain time, and to a specified amount. The sole object of that deed was to obtain for *Thomas Clagett* such a credit; but if the mortgage might have been foreclosed at any time, to enforce payment for any parcel of goods sold, and of every sum of money lent by *Salmon* to *Thomas Clagett*, as it became due, the very object of the deed might have been defeated. He would not have obtained such a credit as could have been used by him, as a capital, with which, to prosecute his business. The mortgaged property might have been sold, or the sureties forced at once to pay, when by postponing the payment, under the assurance of the guaranty, until the first of October, 1830, *Thomas Clagett's* business, even if it should fail, might be so wound

up as to produce no embarrassment, nor result in loss to any one. The limitation of the amount of the credit to \$10,000, also shews it to have been the true meaning of the parties, that *Salmon*, on his part, undertook, and agreed to give credit to *Thomas Clagett*, to that amount, in the manner described, until the first of October, 1830.

Much stress has been laid on the fact, that the notes given by *Thomas Clagett*, and some others of the grantors fell due long before the first of October, 1830; and that *Salmon* being then liable to pay, he must then be considered as entitled to indemnity, by a foreclosure of the mortgage. 4 *Desau*. 45. But that very circumstance shows, that it could not have been their intention to subject themselves to a foreclosure of their mortgage immediately, that those notes fell due; because the express object in so pledging their property was to sustain *Thomas Clagett's* credit, to a period far beyond that time. I am, therefore, of opinion, that the mortgage could not have been foreclosed before the first of October, 1830, and consequently, the stipulation in the agreement, that it should not be foreclosed until two years after the 26th of May, 1828, cannot be considered as an enlargement of the time of payment, to the prejudice of these sureties, who could not be called on for payment before the mortgage credit had expired.

The defendants have further insisted, that the deed of the 17th May, 1828, by which *Thomas Clagett* made an assignment of his goods for the benefit of his creditors, gave to *Salmon* security for the payment of the debt covered by the mortgage, which he was bound to make available to its full extent; or to hold it for the benefit of the sureties of *Thomas Clagett*. But that deed could not in any way be considered as a security held by *Salmon*. His debtor *Thomas Clagett*, placed certain funds by its means in the hands of trustees for the benefit of his creditors generally, which might have been so applied or not; but nothing was thereby put in the hands of *Salmon*, or placed exclusively within his power or control. The agreement of the 26th of the

same month, it is true, did give *Salmon* an additional security for his debt; but he alleges, and it is in proof, that he still holds that security, and he has used all due diligence to make it as productive as possible. There is, therefore, no foundation for this objection, upon which these securities claim to be discharged.

By the agreement of the 26th May, 1828, it is stipulated that after it had been executed by the respective parties, that all responsibilities to and from *Thomas Clagett* shall be annulled, so far as the persons represented by those who signed it, might be concerned. The responsibilities to and from *Thomas Clagett* here referred to, were the notes of *Thomas Clagett*, and his contracts for the payment of money held by *Salmon*, and his other creditors. It is, however, only those responsibilities or securities, held by *Salmon* alone, and which he annulled, that can in any way be considered as prejudicial to these sureties. The whole instrument of the 26th May, 1828, must be taken together, and so taken, it appears that *Salmon* himself discharged *Thomas Clagett* from no responsibility whatever; because it is expressly stipulated that *Salmon* shall retain the mortgage to indemnify him for any deficiency which might exist, after the application of the funds then put into his hands; in other words, that after so obtaining a partial payment, *Thomas Clagett* should be held bound as his debtor for the balance. So far then, there is nothing like a discharge of any security held by *Salmon*. But *Salmon*, it is said, held the notes of *Thomas Clagett*, and it is true he did; but they were notes signed or endorsed by the family of *Thomas Clagett*, who are these very mortgagors, and sureties; and the family of *Thomas Clagett* were expressly exonerated from them only.

Those notes were securities upon which they could not sue, nor derive any benefit from; because they were their own; and an assignment of them according to the requisitions of the implied contract, would have amounted precisely to that, which this agreement declared, a complete exon-



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eration of their liability, and nothing more. It also appears that *Salmon* had lent his notes to *Thomas Clagett*, which *Salmon* had taken up at maturity; but these were responsibilities or securities, upon which *Thomas Clagett* could not have been sued upon an assignment in any form from *Salmon*. The securities which a surety has a right to have transferred to him, must be such as would have enabled the creditors to obtain satisfaction of his debts from funds, or from persons, other than the surety himself; but in this case, there were no such securities held by *Salmon*. It follows therefore, that this objection also of the defendants must fail.

But the plaintiff contended, that even if the mortgage might have been foreclosed, at any time after he became liable on his notes lent to *Thomas Clagett*; or after *Thomas Clagett's* notes, or the money he lent him became due; and even if the agreement of the 26th May, 1828, should be considered as an express enlargement of the time of payment; yet, that these sureties cannot be discharged; because all the remedies have been reserved. It is laid down that a composition with, or giving time to the principal debtor, with a reservation of the creditor's remedies, will not discharge the surety. The giving of time to the principal debtor, with a reservation of the remedies, has in many cases the appearance of absurdity; because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies, in order to hold the surety bound, must amount to this, that the creditor agrees to give time to the debtor; and yet that they both agree, that the surety may at any time force the creditor to proceed against the principal by a bill *quia timet*, or by paying the whole debt, have an assignment of all the securities, and proceed immediately himself against the principal debtor; or in any other mode authorised by the assigned securities. Such an agreement reserving the remedies, might not in many cases be of the least benefit to the principal debtor; since it leaves him entirely at the mercy of the surety; yet if the parties



do so expressly contract, the surety can have no ground to complain, that the implied contract has been altered or impaired in any way to his prejudice; and therefore he cannot be discharged. 6 *Ves.* 807. 18 *Ves.* 20. 3 *Bos. and Pul.* 363. 8 *East.* 576. 1 *Peters*, 575.

By the agreement of the 26th May, 1828, it is expressly declared, that nothing herein contained should in any manner affect the mortgage given by *Thomas Clagett* and his family, to indemnify *Salmon* against certain risks and losses. If this general reservation had been made in an agreement between *Salmon* and the other creditors of *Thomas Clagett* alone, there might have been some difficulty in treating it as such a reservation as would preserve to the sureties the benefit of the implied contract in all respects; because it is not enough that the creditor alone should make such a stipulation, the principal debtor must also consent, that his liability to the surety should remain entire and undiminished. But here, *Thomas Clagett*, by signing this agreement, has thereby distinctly assented to this express reservation of the remedies upon the mortgage itself, as well as upon its incident implied contract; for the stipulation, that nothing therein contained, should affect the mortgage, must, according to every fair interpretation of the expression, be considered as a complete reservation of the remedies to this whole extent. And so considered, it is clear, that these sureties cannot found any claim to be discharged from the mortgage, upon any thing contained in the agreement of the 26th May, 1828.

The defendants moreover object, that supposing they are wrong, as to the time when the mortgage might have been foreclosed, then the plaintiff cannot have under this bill relief of any kind, because he has instituted his suit before his debt became due; and, that if this injunction were to be made perpetual, they would be tied up indefinitely, and thrown at the mercy of the plaintiff, without the possibility of relieving themselves in any way whatever. Where a debt secured by a mortgage is made payable by

instalments, it is well settled that the mortgage becomes forfeited by the non-payment of the first instalment, and may be foreclosed immediately after that time. If a bill be filed for that purpose, the debtor may, however, prevent a foreclosure, or sale, by paying the instalment then due; but if he fails to do so, then the mortgage may be entirely foreclosed; or so much of the property may be sold, as will satisfy the sum due at that time; and the decree will be allowed to stand as a security for the other instalments as they become due. But if the mortgage property cannot be conveniently or safely sold in parcels, then it must be disposed of entire; and the whole debt raised and paid, with a rebate of interest on the sums not due, at the time of paying over the proceeds of sale to the creditor. This is done from necessity, and as an unavoidable consequence of the peculiar nature of the case. 2 *Vern.* 133. 2 *Eden.* 197. 3 *Mad.* 160. 2 *Mun.* 412. 1 *Maul. and Selw.* 706. 1 *Wils.* 80. 3 *Burr.* 1370. *Doug.* 100. 6 *Term. Rep.* 399. 1 *Bin.* 152. 3 *H. & McH.* 94. 6 *Harr. and Johns.* 476.

It is also well established, that if the mortgagor who holds the possession commits waste, or in any manner attempts to diminish the value of the property, or where it consists of personalty, is about to remove it beyond the reach of his creditor, so as to render it unequal to the discharge of the debt; or to place it so as not to be forth-coming for the satisfaction of the debt, he may be restrained by injunction. And an injunction for such a purpose may be obtained at any time before the debt becomes due; for otherwise, a fraudulent mortgagor, might at his pleasure deprive the creditor of all benefit from his mortgage. Upon this ground this injunction was granted, and now reposes. *Eden. Inj.* 119.

It is clear, that this mortgage could not have been foreclosed at the time the bill was filed; because the credit given had not then expired; and therefore, *Salmon* could not then have asked for more than he had prayed for; that is, to have the property placed under the protection of an

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injunction from this court; and relief cannot now be extended to him beyond that of perpetuating the injunction heretofore granted. In a case situated like this, the plaintiff, before the debt became due, filed a bill praying for a sale and an injunction to stay waste. The injunction was granted; and on the coming in of the answer, was, on motion to dissolve, continued to the final hearing. After the mortgaged debt became due the mortgagee filed another bill praying a sale. Upon the hearing of which second bill it was objected in the answer, that there was another suit then depending embracing the same subject. But I consider the first as a mere injunction bill, on which there could have been no decree for a sale, and as not at all inconsistent with the second bill, on which I decreed a sale accordingly. *Brewer vs. Murdoch, Ms. 2, October 1826.*

It was indispensably necessary in this case, that the plaintiff should establish his title, as he has done, and also to show that there was some debt unsatisfied; for if the mortgage had been found to be defective or inefficient in its origin, or had been nullified by the fraud, or any improper act of the plaintiff; or had been fully satisfied, the plaintiff could not have had any foundation on which to call for the preservation and protection of the property, which had never been, or had ceased to be thus legally pledged for his benefit. The validity of the mortgage has been sustained; and it is in proof, that there is still a large amount of debt covered by it. These points having been investigated and determined, as a necessary basis for the decree now called for in relation to this injunction, must be considered as closed, and finally concluded between these parties, and those claiming under them, on any bill which may be hereafter filed, either to foreclose, or to redeem. But it would be needless now to determine the exact amount of the debt due; and therefore, I deem it unnecessary to say, whether the sum received from *Penrice* by *Thomas Clagett*, or the house rent, ought, or ought not to be considered as parts of the mortgage debt, the amount of which it will

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be most proper hereafter to determine upon another bill.  
**2 Mun. 412. 1 Bin. 152.**

Neither of the parties to this suit can sustain any substantial injury from this injunction being made perpetual ; because it will merely so guard the property pledged, as to give to the plaintiff the full benefit of it, when he shall find it necessary, or be prepared to come here, and ask to have it applied to the satisfaction of his claim ; and it will leave the defendants free to redeem and disengage it from the lien by which it is now bound, at any time they may think proper to pay the debt. I shall therefore continue the injunction so as to cover all the personal property now ascertained to be embraced by the mortgage ; subject to the further order of the court, on either a bill to foreclose, or to redeem.

A decree was passed accordingly, from which the defendants appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Alexander*, for the appellant, contended,

1. That the complainant has no equitable claim or right to any part of the personal property mentioned in the mortgage from the appellants to him ; the said property being in the hands of the appellant, *Elizabeth*, as administratrix of *William Clagett*, deceased, and admitted to be liable to the demands of creditors, and next of kin. *Alexander vs. Riston*, **2 Gill and Johns. 96. 6 Bac. Abr. 683.**

2. That by the terms of said mortgage, the appellee stipulated to limit his advances to the sum of \$10,000 ; and by giving credit beyond that sum he released the other appellants, who were only sureties. *Chase vs. McDonald and Ridgely*, **7 Harr. and Johns. 161.**

3. That those sureties are released by the agreement of May, 1828, between the appellee, and the trustees of *Thomas Clagett*, which was intended materially to vary the original contract for guarantee, and to impair, and destroy the remedies to which the sureties, in the absence



of the agreement, would have been entitled. That agreement deprived the sureties of the benefit of the deed of trust from *Thomas Clagett to Cobb & Bidell*, which was for the general benefit of creditors, including *Salmon*. *Hayes vs. Ward*, 4 *Johns. Ch. Rep.* 130. *Craythorn vs. Swinbourne*, 14 *Ves.* 162. 1 *Mad.* 185. *Capel vs. Butler*, 2 *Simons and Steuart*, 457. 3 *Stark. Ev.* 1050. 1 *Mad. Ch.* 405. *Rees vs. Berrington*, 2 *Ves. Jr.* 450. *Gould vs. Robson and Keymer*, 8 *East.* 576.

The agreement also extends the time of payment, as provided in the mortgage, and for that reason discharges the sureties. It has been said, that the mortgage was not forfeitable until 1830, and yet the sureties might have called on the creditor to sue the principal debtor as soon as any part of the money for which they were responsible became due and payable. *King vs. Baldwin*, 2 *Johns. Ch. R.* 562. *Barker vs. Wyld*, 1 *Vernon*, 140. But this agreement discharges the principal debtor, and consequently, the surety is discharged. *Coke Lit.* 232. (a) 4 *Bac. Abr. Release (G)* 282. *Rees vs. Berrington*, 2 *Ves. Jr.* 542. 2 *Chitty Eq. Dig.* 1175. *Shep. Touch.* 395. The reservation of the right to proceed upon the mortgage will not preserve the responsibilities of the sureties; they are discharged by the discharge of the principal. 1 *Poth.* 215. *Ex parte Gifford*, 6 *Ves. Jr.* 805. *Boulton vs. Stubbs*, 18 *Ves.* 20. *King vs. Baldwin*, 2 *Johns. Ch. Rep.* 561. *Chitty on Bills*, 292. When the debt becomes due the surety may call on the creditor to sue the principal debtor, and the surety has a right to pay the debt, and to be substituted to all the rights and securities of the creditor, who cannot deprive him of these advantages, without forfeiting his remedy against him. *Wright vs. Simpson*, 6 *Ves.* 734. *Nisbet vs. Smith*, 2 *Bro. Ch. Cas.* 583. *Gould vs. Robson & Keymer*, 8 *East.* 576. *King vs. Sheriff Surrey*, 1 *Taunt.* 159.

There are some cases in which it has been held, that the right to sue the principal might be *suspended*, without discharging the surety; but none where the principal has been

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released from the debt. When that is done, the surety is absolved from all responsibility. *Dean vs. Newhall*, 8 Term. Rep. 168. *Kirby vs. Taylor*, 6 Johns. Ch. R. 250. And the release of the principal, for a time, is equivalent to a final discharge, in reference to its effect upon the surety. *Coke Lit.* 274. (a)

4. That the appellee has failed to show by his bill, or proofs, any ground for the interference of the court of Chancery by injunction. *Hanson vs. Gardiner*, 7 Ves. 309. *Etches vs. Lance*, 7 Ves. 417. *Hanway vs. McIntire*, 11 Ves. 54. *Matlocks vs. Tremain*, 3 Johns. Ch. Rep. 75. *Woodward vs. Schatzell*, 3 Ib. 412. *Hippesley vs. Spencer*, 5 Mad Rep. 422.

5. That the court of Chancery erred in decreeing a perpetual injunction, and in declaring such injunction to be subject to any order to be passed in another cause. *Nat. Bre.* 140. A final decree cannot be affected by an independent bill filed by either of the parties. There must be a bill of review, or a bill in the nature of a bill of review. *Bolton vs. Bull*, 3 Ves. 140. *Hall vs. Hoddison*, 2 P. Wms. 162.

6. That the complainant was not entitled to his costs. *Foulds vs. Midgley*, 1 Ves. and B. 138. *Chaplin vs. Cooper*, Ib. 16. *Vancouver vs. Bliss*, 11 Ves. 462. 1 Mad. Ch. Pr. 195, 216, 217, 218. 1 Newland's Pr. 398. *Simmonds vs. Lord Kinnauld*, 4 Ves. 746. *Seers vs. Hind*, 1 Ves. Jr. 293. *King vs. Clark*, 3 Paige, 77. *Winslow vs. Collins*, 3 Paige, 89. *Ridgely vs. Gittings*, 2 Harr. and Gill, 58. 2 Mad. Ch. Pr. 577. *Att'y Gen. vs. Butcher*, 4 Russ. 180.

7. That the decree, dismissing the bill as against *Richard H. Clagett*, the minor, ought also to have declared the mortgage void, and inoperative against him, and that the injunction should be subject to his rights. 2 Harr. Ent. 298. *Giles vs. Barimore*, 5 Johns. Ch. R. 549.

8. The mortgage is inoperative as to the personalty, from the failure to record it in time. *Gassaway vs. Dorsey*, 4 Harr. and McHen. 405. Stat. 13, Ed. 1. 2 Inst. 331. 2

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*Harr. Ent.* 252. *Coke Lit.* 384. (a) *Hurn vs. Soper*, 6 *H. and Johns.* 280. *Belt vs. Hepburn*, 4 *H. and McHen.* 527.

*Taney*, (Att'y Genl. U. S.) *Johnson*, and *Mayer*, for the appellee.

If the question of costs is subject to the review of this court, which may be well doubted, there is nothing in the circumstances of this case which should except it from the general rule, allowing costs to the successful party. The defendants have contested the complainant's claim throughout, and subjected him to a great deal of unnecessary trouble and expense in establishing his claim. *Winder vs. Dufferfer*, 3 *Gill and Johns.* 311. *Vancouver vs. Bliss*, 11 *Ves.* 462. *Newell vs. Trustees of Huntington*, 1 *Johns. Ch. R.* 182.

2. The mortgage was designed to guarantee the appellee against loss, and the words of the instrument are to be construed most strongly against the mortgagors. *Mason vs. Pritchard*, 12 *East.* 228. It has been said, that the mortgagors did not intend that *Salmon's* responsibilities for *Thomas Clagett* should exceed \$10,000, and that by going beyond that amount they are discharged from liability. This however, cannot be the true construction of the mortgage, nor could such have been the design of the parties; unless we suppose they intended that *Thomas Clagett's* debts to every body should never, in the aggregate, exceed \$10,000, for, with respect to the risk of the mortgagors, it is precisely the same, whether the money is due to *Salmon* alone, or to *Salmon* and others. But the authorities on this point are conclusive, and need only be referred to. *Lanusse vs. Barker*, 3 *Wheat*, 148, (note.) *Sturges vs. Robbins*, 7 *Mass. Rep.* 301. *Kirby vs. Duke of Marlborough*, 2 *Maul. and Selw.* 18.

3. The failure to record the mortgage in time, is no objection to its validity as between these parties. The case in 4 *Harr. and McHen.* 405, only decides, that an *office copy* of a paper not recorded in time, is not evidence, and not that the *original* would not be binding upon the parties to it.



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The acts of 1729, *ch.* 8, and 1763, *ch.* 13, are to be construed together. The former embraced the cases of sales, gifts, and mortgages. The latter only of gifts of negro slaves, and of course, gifts only are affected by it. The objection, that the personal property was in the hands of *Elizabeth Clagett* as administratrix, and for that reason, that the mortgage is invalid, is equally destitute of foundation. After such a lapse of time, the legal presumption is, that the debts of the deceased have been paid, as was decided in *Allender and Riston*; but if this was not so, still, as between the administrator and the grantee, the former cannot be allowed to impeach the deed, upon the ground that it was made in fraud of creditors. Such an objection cannot be made by him. *Marshall vs. Williams*, 4 *Gill and Johns*. 376. Nor can the distributees make the objection, because they also are parties to the deed. The minor, *Richard*, does not in his answer rely upon his infancy as a defence. He, like the other defendants, puts the complainant upon the proof of his claim, and relies upon the other defences set up by them. If he had relied upon his infancy, and had asked that his share of the fund should be paid him, it might have been different; but as he has not done so, and seeks to vacate the whole deed, he cannot have his proportion paid him. It is, therefore, the ordinary case of an administrator, and distributees, disposing of the estate of an intestate, which disposition is good unless impeached upon the ground of fraud, of which there is no evidence, nor is there any evidence that *Salmon* knew that *Richard* was a minor, or that there were other distributees besides those who executed the deed. *Allender vs. Riston*, 2 *Gill and Johns*. 97. 7 *Johns. Ch. R.* 17. But in point of fact, the minor is not prejudiced by the decree in this case. The bill as to him is dismissed with costs, and when the fund gets into the court of Chancery the decree interposes no obstacle to his there seeking and recovering his share. The object of this bill is simply to prevent the parties to the mortgage (as to whom it is unquestionably a valid instrument) from alienating the property, and the de-



cree only perpetuates the injunction for that purpose. It does not direct a sale, nor in any way affect the minor's interest.

The fourth and fifth points of the appellants assume the validity of the mortgage, and say, that at the time the bill was filed, the mortgagee might have foreclosed. This is not so; at the time the bill was filed the mortgagor was not in a condition to foreclose as to the real, or take possession of the personal estate. The agreement with *Cobb and Bidel* took from him this right. At the time the bill was filed, the appellee had no remedy at law, and if a court of Chancery could not interfere by way of injunction, the danger of loss to which the property was exposed could not be averted. The decree does nothing more than protect the appellee from fraud, and this court consequently cannot reverse it. It is said that there could not be a final decree or perpetual injunction. The answer to this is, that the case was to be finally disposed of in some way, so that the party entitled should recover his costs. But there is nothing in the decree which prevents the defendants from redeeming. They are not to await the proceedings of the opposite party. It has been urged, that the effect of a final decree in one case, cannot be altered or impaired upon a subsequent independent bill. Though this may possibly be true as a general rule, it cannot apply to a case like the present, where, from the very nature of the proceeding, a subsequent bill is indispensable. To show that the bill made a proper case for an injunction, they referred to *Jeremy's Eq.* 306. *Eden Inj.* 1. *Keyes vs. Brush*, 2 *Paige's Rep.* 311.

6. The agreement of the 26th May, 1828, between the appellee and the trustees of *Thomas Clagett*, does not release the sureties. The proviso in the mortgage is, that if *Thomas Clagett* should pay the sums for which the mortgage was to stand as a security, by the 1st of October, 1830, it should be void. The payment then, on or before that day, would save the mortgage, as to every description of liability or advance to be made by *Salmon*. It cannot be supposed

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that the mortgagors intended that if *Salmon* should make an advance, or pay a note for *Clagett*, at any time before the 1st of October, 1830, that he should be at liberty at once, to foreclose for the amount so paid or advanced. The object of the parties at the time of the contract was, to give *Clagett* the advantage of *Salmon's* aid until the 1st of October, 1830, which would be defeated by a construction, authorizing him to proceed against the sureties earlier. If this be the true construction of the mortgage, then the agreement of May, 1828, does not enlarge the time, because, it leaves him at liberty to proceed in May, 1830. One of the stipulations of this agreement is, that the mortgage shall not be impaired by it. No construction, therefore, can be given to it which will have that effect, because that stipulation is as essential a part of the agreement as any other. If it cannot be so executed as to avoid that effect, it should not be executed at all. An agreement for time which will discharge a surety, must be an agreement to give time in the very contract supposed to be discharged, and must suspend the creditor's remedy on that account. *Planter's Bank vs. Selman, 2 Gill and Johns.* 230. But the agreement in this case did not suspend the remedy on the mortgage, and of course, it cannot be discharged. Nor does the agreement release *Clagett*, as has been urged. In the first place, it is not a technical release under seal; and in the second, it contains no words of present release, but only stipulates for his discharge, upon his doing certain things which he not only has not done, but is now resisting.

But suppose the agreement does give time, and release the principal debtor, cannot that be done with an effectual reservation of the creditor's remedy against the surety? If time be given, or the principal released without such reservation, the surety is discharged, because otherwise the debtor could not have the benefit of the release, as the surety, if made to pay the money, might immediately, notwithstanding the release, proceed against his principal. The latter therefore would be deceived, and tantalized with

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hopes which could not be fulfilled. If however the debtor consents to the reservation, he can have nothing to complain of, nor is the surety injured, since his remedy over against his principal, is precisely as it was before the release, and he stands in all respects after, as he stood before. *Ex parte Gifford*, 6 Ves. 835. *Boulton vs. Stubbs*, 18 Ves. 20. *Chitty on Bills*, 294. 1 Saund. P. and Ev. 309. 3 Kent Com. 112.

STEPHEN, J. delivered the opinion of the court.

The decision of this case involves the consideration of several important principles of equitable jurisprudence, relative to the doctrine of substitution, and the rights, duties, and obligations resulting from the relation of principal and surety. (And here the judge referred to the statement of the cause as set forth in the commencement of this report.)

The defendants appealed from this decree, and contended that it should be reversed, because the complainant has no equitable right or claim to any part of the personal property mentioned in the aforesaid mortgage, the said property being in the hands of the appellant, *Elizabeth*, as administratrix of *William Clagett*, deceased, and liable to the demands of the creditors, and next of kin of the deceased: They further contend, that by the terms of the mortgage, the appellee stipulated to limit his advances to *Thomas Clagett*, to the sum of \$10,000, and by giving credit beyond that sum, he released the other appellants, who were only sureties. That those sureties are released by the agreement between the appellee and the trustees of *Thomas Clagett*, which was intended materially to vary the original contract for guarantee, and to impair, and destroy the remedies to which the sureties in the absence of the agreement would have been entitled. They also contend, that the appellee has failed to show by his bill or proofs, any ground for the interference of the court of Chancery by injunction; and that the court of Chancery erred in decreeing a perpetual injunction, and declaring such injunction to be subject to



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any order to be passed in another cause. And that costs ought not to have been decreed to the appellee. They finally contend, that the decree dismissing the bill as against *Richard H. Clagett*, ought also to have declared, that the aforesaid mortgage is void, and inoperative against him, and that the injunction should be subject to his rights.

As to the first objection raised by the appellants, that the deed of mortgage conveyed no right or title to the personal property therein specified; it may be remarked, that the deed only professes to convey all their right and title to the property, which of course was subject to the claims of creditors, if any such there were, but from the lapse of time which had taken place between the death of *William Clagett*, and the date of the letters of administration granted to his widow, *Elizabeth Clagett*, and the date of the mortgage, it is fair to presume that the debts were all paid and satisfied prior to that time, and consequently that the mortgage did not in any degree operate to their prejudice. It appears by the proof in the cause, that an inventory of his estate was returned in the year 1816, and that his administratrix settled with the Orphans Court an account which she termed a final account in the year 1823. The deed of mortgage was not executed till the year 1827. It appears then, that a period of about eleven years had expired from the time letters of administration were taken out upon his estate before the mortgage was executed; and this court have said in the case of *Allender vs. Riston*, 2 *Gill and Johns*. 99, "in the case now before this court it no where appears that there were any debts remaining due and unpaid at the time of the mortgage; or if there were, that the defendants knew of them;" and to use the language of Mr. *Justice Ashhurst*, in 4 *Term. Rep.* 645; "if the creditors will lie by and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied." In the case now before this court, the presumption of payment arising from lapse of time is strongly fortified and corroborated by the fact, that the administratrix passed her



final account with the Orphans Court, several years prior to the execution of the deed of mortgage.

In the case above referred to, this court held the following language, which is strikingly applicable to the case under consideration. "It does not appear that the administratrix acted in her representative character at the time she executed the deed of mortgage. She does not in terms assume that character, and has associated herself in making the disposition of the property with three of the children, and representatives of her intestate. From this fact, connected with the strong circumstances existing in the case to induce a presumption that the debts were all satisfied, it is fair to infer, that she had made a distribution of the remaining assets, and acted in her character of distributee." But it is contended on the part of the appellants in this case, that the bill of the complainant shows that no distribution was ever made prior to the execution of the deed of mortgage in this cause; but so far from this being the fact, upon recurring to the bill it will be found that it expressly charges that distribution was made by the Orphans Court, but that the property never had been actually delivered to the representatives, but remained in the possession of the administratrix, and *Edmund Clagett*, one of the distributees, who used and employed the same for the common benefit of themselves, and the other heirs and legal representatives. If this view of the case be correct, and there was sufficient ground to infer that the debts were all paid and satisfied, the next question which arises is, whether or not the deed is binding and obligatory on the mortgagors who executed it; and the question as to the power or right of an executor to appropriate the assets of the deceased, in any manner not conformable to the duties of his trust, is not necessarily involved in the consideration of this case. We do not consider that the act of 1763 has any operation or bearing upon the merits of this controversy, as it relates wholly to gifts of negroes and slaves, and has nothing to do with mortgages or other assurances for valuable considera-

tion. By the provisions of the act of 1729, *ch. 8*, a mortgage of personal property, of which the mortgagor retained possession is void, unless acknowledged and recorded as therein prescribed, so far as the rights of creditors are concerned; but although not recorded at all, or not recorded in time, it is still legally operative and effectual against the mortgagor, and all claiming under him. This court have accordingly in *Dorsey vs. Smithson*, 6 *Harr. and Johns*. 63, decided, that a deed not recorded as the act of Assembly directs, is void as to creditors if made to their injury, but it is binding on the donor, and all claiming under him, both at common law, and under said act. This case also shows that the deed being binding and obligatory on the parties thereto, they are estopped to allege that the same is in fraud of creditors. In *Hudson vs. Warner and Vance*, 2 *Harr. and Gill*, 427, this court sanction the same principle, and held the following language in reference to the case then before them. "The bill of sale made in 1820 to *Warner and Vance* was made upon a good consideration. It was made to indemnify them against suretyships entered into, and to be entered into by them for *J. and T. Vance*, and it cannot be questioned but that it was perfectly available, as between the immediate parties to the instrument, although it was not recorded. It might be void against creditors who were injured by it, yet nevertheless binding on them." We are therefore of opinion, that the deed of mortgage was legally binding, and obligatory upon all the parties who were of full age at the time it was executed.

As to the objection that the sureties are discharged, because *Salmon* did not limit his advances to the sum of \$10,000, we think that no such result legitimately flows from the contract, according to its true and proper construction. The same objection was made and overruled in a case strikingly analogous, reported in *Sturges et al. vs. Robbins*, 7 *Mass. Rep.* 301, 304. That case was as follows: "A subscribed a memorandum of the following tenor, viz: the subscriber hereby engages to Messrs. B

and C, that if they will credit D, a sum not exceeding \$500, in case he shall not pay the same in twelve months from this date, I will pay the same myself. In consequence whereof, B and C sold goods to D, to the value of \$500, taking his promissory note for that sum. Immediately after B and C sold D other goods, for which he gave another note for \$375. Within the year D paid \$200, which was endorsed on the last mentioned note, and in three months after the year expired, he paid the balance of that note, and it was cancelled. Soon afterwards B and C sold other goods to D, taking his promissory note for \$379 for the same, without any guarantee; \$200 were paid on this last note, the balance thereof, and the whole of the note for \$500 remaining unpaid. In an action by B and C against A, upon the memorandum aforesaid, it was held, that A was answerable for the \$500 and interest, from the expiration of the year; due notice having been given him, that the debt which he had guarantied was unpaid, and the same having been demanded of him.—*Parker, J.*—on the facts agreed in the case; the question submitted to us is, whether the defendant is liable for the whole, or any part of the sum mentioned in the writing on which the action is founded. The counsel for the defendant has contended, that the writing signed by the defendant contained a conditional engagement only, and that the condition is of a nature to avoid the contract, if not strictly complied with by the plaintiffs, the true construction of the writing being, that the defendant would be answerable, if the plaintiffs did not trust *Davis* more than \$500, but that if they exceeded that sum, he was not to be liable. We cannot adopt this construction, being satisfied, that the words which are supposed to amount to a condition, were intended by the defendant, only to limit his responsibility to the sum of \$500; there being no reason why he should be unwilling that *Davis* should obtain further credit on his own responsibility, a circumstance which would diminish, rather than increase the defendant's eventual liability to pay the money."

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We think, under the allegations contained in the bill, and the circumstances of this case, the chancellor did right in granting the injunction, for the purpose of holding the property responsible for the satisfaction of the mortgage. The language of the complainant's bill is, "that he has reason to believe, and therefore charges, that the defendants contemplate and design to sell and dispose of part or the whole of said property, with a view of defeating your orator's lien, and that he is apprehensive, the defendants will sell, dispose of, conceal or remove the whole, or a part of the personal property, before the same can be made responsible to him, for the satisfaction of his claim." In the case of personal property, held by one for life, remainder to another, where danger of loss, or injury is apprehended. *Chancellor Kent*, in 2 *Com.* 286, 287, speaks in the following terms. "The interest of the party in remainder in chattels, is precarious, because another has an interest in possession, and chattels by their very nature, are exposed to abuse, loss, and destruction. It was understood to be the old rule in Chancery, that the person entitled in remainder, could call for security from the tenant for life, that the property should be forth-coming at his decease; but that practice has been overruled. *Ld. Thurlow* said, that the party entitled in remainder, could call for the exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. But it is admitted, that the security may still be required in a case of real danger, that the property may be wasted, secreted, or removed." To the same effect is 2 *Fearne on Remainders*, 35, where he says, "we may recollect its having been said, that in case of a bequest of goods, to one for life, with remainder over, the legatee for life was compellable in equity, to give security for the goods being forth-coming at his decease, and accordingly, in the above cited cases of *Vachel vs. Vachel*, and *Hyde vs. Parratt*, the bills appear to have prayed such security, and this it seems was the old rule of



the court. But the latter practice is, for an inventory to be signed by the devisee for life, and to be deposited with the master for the benefit of all the parties, which *Ld. Thurlow*, in a late case observed, was more equal justice, as there ought to be danger in order to require security."

As establishing the same principle, we have the following in case in 4 *Hen. and Mun.* 503. "The defendants had recovered a judgment at law, against the plaintiff for some negroes, the use of whom was devised to the defendant's wife for life, and then to the plaintiff, and the bill was filed for an injunction, which was granted, to inhibit the defendants from getting possession of the negroes until they gave security for their forth-coming at the death of the wife, upon this ground, that her husband having failed as a merchant, might put the negroes beyond the plaintiff's control. Upon the coming in of the answer, although it denied that allegation, and of which there was no proof, the court refused to dissolve the injunction, as both parties had become interested in the continuance thereof; and directed an account of the profits since the verdict, which account was reported, and the cause now came up for a final hearing. By the chancellor, though it is a matter of course for one in remainder of chattels, to file a bill for an account, and an inventory of the property, that it may be certainly known; yet, the court will not rule the tenant for life to give security, unless there appears to be some danger of wasting, or putting the property out of the way. In this case, that danger does not appear. The report however, which contains an account of the property, may be confirmed as a beneficial one to both sides, since the plaintiff was properly admitted into court." The principles recognized in these cases fully justify the granting of the injunction to preserve the property, and prevent it from being removed before it could be made responsible to the complainant's claim, according to the terms of the contract entered into between the parties. The only effect and operation of it, was to put it out of the power of the respondents, to commit an act of fraud and in-

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justice, of which they must complain with very ill grace in a court of conscience.

Neither do we think that the chancellor erred in decreeing costs to the appellee, even if an appeal would lie for costs. In *Eastburn and Downes vs. Kirk*, 2 Johns. Ch. Rep. 318, Chancellor Kent says, "costs in chancery do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances. A litigation for costs only, is never favored in a court of equity. A party cannot have a re-hearing for costs only, except in special cases, and it is understood that an appeal will not lie merely for costs. Selw. Wyatt, Prac. Reg. 34, says, "a party cannot appeal for costs only, but in particular cases the rule may, and has been dispensed with. He then adds a *quere*, whether it can be dispensed with, only in cases, where it appears on the face of the decree, that costs are improperly given, or where the merits must be gone into?" So in *Doe ex dem. vs. Winch et al.* 5 Barn. and Ald. 393. ABBOTT, Ch. J., says, "the costs at law, are the legal consequences of the suit. The costs in chancery, are in the discretion of the chancellor, and entirely depend upon circumstances." Without intending to decide whether an appeal will lie on account of costs or not, we do not think that the circumstances of this case would warrant an exception to the general rule. If the general rule be as above stated, that a party cannot appeal for costs only, it sufficiently appearing from the pleadings and facts of the case, that the party complainant had good grounds, and was well warranted in applying to the Court of Chancery for its aid and assistance in preserving the property until it could be applied to his indemnity, and consequently that costs were properly awarded to him. With respect to the effect of the agreement between *Thos. Clagett*, the trustees of *Thomas Clagett* and the appellee, and

how far it operates to discharge his sureties, it may be remarked that though the rule of law is well known to be, that if two persons be bound jointly and severally, and the obligee releases one of them, both are discharged, yet, equity will not give a release an operation beyond the intention of the parties, and the justice of the case. The release is to be construed according to the intent and object of it, and that intent will control and limit its operation. *Fonb. Eq.* 511. So in 6 *Johns. Ch. Rep.* 242, the principle was adjudged to be, that “where two or more persons are jointly, and severally bound in one obligation, a release of one obligor entirely discharges the rest at law, but not strictly so in equity. For equity will not extend the operation of a release beyond the clear intention of the parties, and the justice of the case, but will construe it to relate to the particular matter intended to be released. Thus, where A, B, and C, guardians, executed a bond, jointly and severally with T, as their surety, for the faithful performance of their guardianship, and the ward, after coming at full age, executed a release to A, adding, “but this release is not to apply to, or affect my claim against B, my acting guardian, and whose account remains unsettled,” Held, that the release as to A was good, and was also a good defence to T, so far as he was surety for A; but that he remained bound for B and C, the other two obligors.”

It is true, that where time is given by contract, to the principal for the payment of the debt, without the consent of the surety, he will be discharged, because he is only bound by the terms of his contract, and any variation of those terms without his consent, will operate to discharge him. Thus, in *King vs. Baldwin*, 2 *Johns. Ch. Rep.* 559, *Chancellor Kent* says, “all the cases of relief of surety have gone upon the ground, that time was given to the principal by contract, without consent of the surety. The doctrine is, that the surety is bound by the terms of his contract; and if the creditor, by agreement with the principal debtor, without the concurrence of the surety, va-



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ries those terms by enlarging the time of performance, the surety is discharged, for he is injured, and his risk is increased. The surety is entitled to pay the debt when it becomes due, or he may call upon the creditor by the aid of this court, to enforce his demand against the principal debtor. On paying the debt, he is entitled to the creditor's place by substitution, and if the creditor by agreement with the principal debtor, without the surety's consent, has disabled himself from suing, when he would otherwise have been entitled to sue under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. This is the true principle to be extracted from the cases." It is then upon the principle, that the contract of the surety is changed, or varied to his prejudice, and without his consent, that the surety is discharged. It is because the creditor has disabled himself from fulfilling the duties and obligations which he owes to the surety, that he is released from his responsibility. By giving time to the principal debtor, he disables himself from suing him so soon as the debt becomes due, when called on by the surety, through the intervention of the court of equity to do so. By extending the time of payment, he moreover deprives the surety of the benefit of substitution, according to the original terms of the contract; because upon paying the debt, the surety would have been clothed or invested with the creditor's rights against the principal debtor; and but for the change of contract, would have been entitled to have immediate recourse to him for reimbursement and indemnity.

In the agreement entered into between *Salmon, Clagett*, and his trustees in this case, we find the following stipulation. "It is expressly understood, that nothing contained in this agreement shall in any manner affect the mortgage heretofore given by *Thomas Clagett* and his family, to indemnify said *Salmon* against certain risks or losses, except-



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ing so far as to delay foreclosing the said mortgage from two years from the date hereof." The said agreement also contained the following stipulation. "After this agreement has been executed by the respective parties to it, it is understood, that all responsibilities to and from *Thomas Clagett* shall be annulled, so far as the persons we severally represent be concerned. Also to exonerate the family of *Thomas Clagett* from the payment of such notes as may be signed or endorsed by them, and held by said *Salmon*, not interfering with, or invalidating their liability in the mortgage held by said *Salmon*." Here then, we find an express reservation by *Salmon* of all his rights under the deed of mortgage, and an express contract, that the liability of the sureties of *Thomas Clagett* should not be in any degree lessened or impaired by the terms of said agreement. What is the legal effect and operation of such a reservation upon the relative rights of *Salmon*, and the sureties of *Clagett*, and how far they are absolved from all responsibility to *Salmon*, in virtue of said agreement, remains now to be considered?

In *Boulton vs. Stubbs*, 18 Ves. 26, the *Ld. Chancellor*, after stating the general principle, that if time is given to the principal the surety is discharged, holds the following language. "The objection to the reserve of remedy against the surety consists, in the interest the principal has, that the surety shall not be applied to. It is said, that the principal cannot by contract deprive himself of the benefit derived from that forbearance; and there certainly have been decisions, that if time is given to the principal reserving the right to go against the surety, the principal cannot raise the objection upon his right to time, as against the surety, as there is the contract of the principal arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal. That was *Burke's* case. If the contract for reserve against the surety prevents his remedy

against the principal, that contract for reserve will not do. But the question is, whether it does in law deprive the surety of that benefit. It may in many cases be a very rational provision that the principal shall have time, provided he can have it without prejudice to the benefit of the remedy against the surety; which, though worth nothing at present, may in a year's time be very valuable, and the creditor may very reasonably mean to secure the benefit of that contingency." So also, it is said in *Chitty on Bills*, 203, that a composition with the acceptor, or other party to a bill, reserving the remedy for the remainder against the other parties, has been recognized in courts of law and equity, as not discharging such other parties. And in 1 *Saund. Pl. and Ev.* 378, the same principle is stated, where he says a composition with the acceptor, or other party to a bill, reserving the remedy for the remainder against the other parties, will not discharge such other parties. There are two grounds upon which a creditor is held to discharge the surety by giving time to the principal. "According to one, the creditor by agreeing to give time, is regarded as having disintitiled himself to proceed against the debtor, until the time agreed to be given is expired. But an agreement which has such an effect, is inconsistent with the obligation of the creditor to sue the principal debtor at any moment when called upon to do so by the surety; as the creditor's voluntary disablement of himself for the performance of this, or of any obligation which he is under towards the surety, discharges the surety. According to the other, he is regarded as having in point of good faith towards the debtor, obliged himself not to proceed against the surety; because, supposing him to proceed against the surety, and the surety to pay, the surety would be entitled instantly to proceed against the debtor; and so, through the medium of the surety, he would deprive the debtor of the time which he agreed to give him; and therefore, to preserve good faith, he shall not proceed against the surety." 1 *Law Library*, 107. So also, "the

surety who has paid the debt of his principal, is entitled to stand in the place of the creditor, as to all securities for the debt held or acquired by the creditor, and to have the same benefit from them as the creditor." *Ib.* 150. But if the creditor reserves his remedy against the sureties, in the contract he makes with the principal debtor, the debtor thereby tacitly consents to forego, or waive the benefit of such contract, in case the creditor should afterwards find it necessary to resort to the sureties for the full and complete extinguishment of his debt. The contract therefore between the creditor and principal debtor, is not absolute, but conditional and contingent. In the case before this court, *Salmon* had taken an assignment of property, for the satisfaction of his claim against *Clagett*. He did not know at the time, to what extent it might be available for that purpose; and therefore his object evidently was, not to lose the benefit of the surety he had obtained for its payment, by the arrangement he made with *Clagett* and his trustees. After stating that *Clagett* should be discharged, and his family released from certain notes signed and endorsed by them, upon the execution or fulfilment of the agreement entered into between the parties, such release, not to interfere with, or invalidate their liability in the mortgage held by *Salmon*, the parties to the contract insert the following stipulations. "It is expressly understood, that nothing contained in this agreement shall in any manner affect the mortgage heretofore given by *Thomas Clagett* and his family, to indemnify said *Salmon* against certain risks or losses, excepting so far as to delay foreclosing said mortgage for two years from the date hereof." Here then, we find an express contract on the part of *Thomas Clagett*, that notwithstanding this agreement for his discharge, the remedy of *Salmon* upon the mortgage, should not in the slightest manner be affected by it, but that his rights should remain the same as they were before such agreement, with the exception only of the delay of foreclosure, as therein stated. This reservation of his rights to



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proceed against the sureties, contained in the same instrument stipulating for the discharge of the principal, amounted to an agreement on the part of the principal, to waive the benefit of that discharge, and to hold himself responsible to his sureties, in case *Salmon* should find it necessary to resort to them for payment or indemnity. As therefore in such an event, their rights and remedies against *Clagett* remained wholly unimpaired and unaffected, we do not perceive that they have any cause to complain, or that there is any ground, either in law, justice or reason, upon which they can claim to be discharged. By coercing payment from the sureties under this express agreement, no fraud would be practiced upon the principal, or injustice done to him, in case they should resort to him for reimbursement or indemnity; because the assent of the principal to continue liable to them, was implied in the reservation of the rights of the creditor to proceed against the sureties.

We do not think that there is any error in the chancellor's decree, so far as the interest of *Richard H. Clagett* was concerned. As to him the injunction was dissolved, and the bill dismissed with costs. Farther than this, we do not think the chancellor was bound to go, so far as his interest was involved in the controversy. Nor do we think that the decree passed by the chancellor in this case, was improper or objectionable. It merely provided for the security of the mortgaged property, until it was made to answer the purposes for which it was pledged under the deed of mortgage, and was well adapted to the exigency and justice of the case. In *Wyatt's Practical Register in Chancery*, p. 154, he says, "A decree is a final sentence or order of court, determining the rights of matters in question, according to equity, and ordering the parties accordingly, pronounced on hearing and understanding the cause."

Thinking the decree in this case perfectly conformable to the substantial principles of equity, and well adapted to secure the purposes of justice, we think the same ought to be affirmed.

DECREE AFFIRMED WITH COSTS.



**CUMBERLAND DUGAN vs. THE MAYOR AND CITY COUNCIL OF BALTIMORE—THE MAYOR AND CITY COUNCIL OF BALTIMORE vs. DUGAN & M'ELDERRY.—June, 1833.**

By the act of 1784, ch. 62, it was declared, that, &c. shall have power and authority to build and erect a market house on a parcel of ground, situate in the town of *Baltimore*, opposite *Harrison* street, beginning in *Baltimore* street and running thence S. of the width of 150 feet to *Water* street, *with the privilege of extending the same to the channel*; and that the market house, when erected, and the ground whereon the same shall be built, with the privilege aforesaid, shall be vested in the commissioners of *Baltimore* town, and their successors. In pursuance of this power a market house was built to *Water* street. The space south of the market house to the channel was a continuous marsh, covering the width of 150 feet. D and M<sup>s</sup> owned lots on the east and west of the space adjoining the same, and extending south to the waters of the harbor of *Baltimore*. In 1794 they applied to the commissioners of the town of *Baltimore* for permission to make a canal and wharf, at their own expense, in the market space, from the south side of *Pratt* street, (which was in fact the south side of their own lot) to the channel or warden's line of the basin of *Baltimore*. The canal to be 80 feet wide, and with streets on each side of the same. The canal, wharf, and streets, to be made public for the use of the inhabitants, under the laws and regulations of the Board of Commissioners; and to be relinquished up to the commissioners whenever the same, or any part thereof, might be wanted for market houses. The Commissioners granted the request, with the declaration "that the privilege of filling up the canal, and of the whole space of 150 feet wide, be fully reserved to the commissioners and their successors, for the use of the town according to the act of 1784, ch. 62—and that the canal, wharves and streets on each side of the canal, be a common highway, and free for the public use, and subject to such regulations as the commissioners and their successors shall, from time to time, establish; and that D and M extend *Pratt* street through their lots of ground on each side of Market space, and leave *Pratt* street through those lots forever as a street for the public use." Under this authority D and M opened *Pratt* street, and made fast land from *Water* street south to the channel, and built a canal or dock with the streets adjoining, as contemplated. After this, both the corporate authorities and D and M claimed to collect wharfage from vessels using the dock—and upon cross bills filed, it was held.

1. That the act of 1745, ch. 9, sec. 10, which declared "that all improvements of what kind soever, made out of the water, shall, as an encouragement to such improver be forever deemed his inheritance," did not apply to this case—That the improvement in front of the market house lot was not such a one as was justified by the act of 1745.

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2. That the entire parcel of ground from *Baltimore* street to the channel, 150 feet in width, by the act of 1784, ch. 62, was vested in fee in the town Commissioners and their successors, with power to reclaim the marsh for the convenience of persons frequenting the market house.
3. That it was not the design of the commissioners to give D and M any right of property in the proposed improvement, and that they have no right to wharfage.
4. That the improvements, when made by D and M vested in the town commissioners, in the samemanner as they would have done if made by the commissioners, and that therefore, the corporation of the city of *Baltimore* had the right to collect wharfage from persons using the dock in question.
5. Over wharfage collected at private wharves, or wharves other than those owned by the town or city of *Baltimore*, or made at the ends or sides of public streets, lanes or alleys, the town or city officers have no control. Its imposition and collection is the exclusive privilege of the wharf owners. It is otherwise with wharfage collected at wharves owned by the town or city, or at the ends or sides of the streets, lanes or alleys—all these are called public wharves.

CROSS APPEAL from the Court of Chancery.

The amended bill, which was filed in 1831 by the appellant in the first case, and *Thomas M'Elderry*, since deceased, and which by agreement was received as an original, and in lieu of the first bill, filed in September, 1806, stated, that before the 10th of February, 1794, a parcel of ground situate in the then town, now city of *Baltimore*, and opposite *Harrison* street, beginning in *Baltimore* street and running thence, &c. of the width of 150 feet to *Water* street, with the privilege of extending the same to the channel, was vested in the commissioners of *Baltimore* town and their successors, with power to hold the same for the benefit of the said town, under and by virtue of an act of Assembly of this State, of 1784, entitled "an act for establishing new markets, and building market houses in *Baltimore* town, and for the regulation of the said markets." That on or before the said 10th of February, 1794, the said *Dugan* was seized in fee of the ground now occupied by *Pratt* street, on the west side of *Market* space, and adjoining thereto, and running from the north side of the street to the water—and said *M'Elderry* was seized in like manner of the ground on the east side of the aforesaid *Market* space, and also run-

ning from the north side of said street to the water. And that the said commissioners of *Baltimore* town, and the said *Dugan* and *M' Elderry*, being so entitled respectively, to the said several parcels of ground, they the said *Dugan* and *M' Elderry*, on the 10th of February, 1794, proposed to the aforesaid commissioners to extend the *Market* space at their own expense, in the water, to the channel, upon certain terms and conditions, which, with some modifications, were accepted and agreed to by the said commissioners, as will appear by a copy of the agreement herewith exhibited. That immediately upon making this agreement they proceeded to fill up the space, and to make the canal, wharves and streets mentioned therein, and fully completed the same in the year 1795 and 1796, and that they have in all things on their part complied with said agreement, at great personal expense to them respectively. That when these improvements were commenced, the usual and common tide at the said *Market* space, flowed up to, and over *Water* street, and that they filled up and made fast land, the whole space from *Water* street to the south side of *Pratt* street, of the breadth of 150 feet, and extending into the water for the distance of 300 feet, and made canals, with wharves, and a street on each side, by means whereof an unwholesome marsh has been converted into firm ground, and become a convenient and commercial part of the city. That by virtue of the aforesaid contract, and the laws of this State, the complainants had a right to demand and receive wharfage from vessels lying at the wharves so made by them, and that such right will continue, until the right reserved by the commissioners in the contract, to fill up the said canal, and the whole space of 150 feet, shall be exercised, which has not yet been done, either by them or their successors, or by the *Mayor and City Council of Baltimore*. That from the time said wharves were in a condition to be used, the complainants have exercised the right to charge wharfage, and continued to do so, during the existence of the Board of Commissioners, and for some time



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after their powers were transferred to the *Mayor and City Council of Baltimore*, without hindrance or molestation. That by the act of 1796, the powers and authority which had been delegated to the Commissioners, were all transferred to, and vested in the *Mayor and City Council of Baltimore*, who sometime thereafter began to suggest doubts of the title of complainants to the aforesaid wharfages, and finally prevented them altogether from receiving the same, and took them into their own possession. *Prayer*, for an account, an injunction, and for general relief.

Exhibit A, referred to in the bill, is as follows :

*"To the Commissioners of Baltimore town,*

GENTLEMEN,—We the subscribers, request your permission for making a canal and wharf, at our expense, in the *Market* space, from the south side of *Pratt* street to the channel, or warden's line. The canal to be 80 feet wide, and the streets on each side the same to be 35 feet wide. The said canal, wharf and streets to be made public for the use of the inhabitants, under the laws and regulations of your board, and the whole of the same to be relinquished up to the commissioners whenever the same, or any part thereof, may be wanted for market houses.

CUMBERLAND DUGAN,

THOMAS M'ELDERRY.

*Baltimore, 10th February, 1794."*

"The commissioners of *Baltimore* town having considered the above application, have no objection to *Thomas McElderry* and *Cumberland Dugan* filling up the space of 150 feet wide, on a line with the present *Market* space from *Water* street, as far as a line drawn from the south side of *Pratt* street shall intersect or cross the said space, and after filling up the said space the commissioners have no objection to their making a canal from the same line of intersection to the channel, of 60 feet wide with wharves, and a street on each side of said canal of 45 feet wide, but with this express declaration, that the privilege of filling up said canal, and of the whole space of 150 feet wide, be fully re-



served to the said commissioners and their successors, for the use of said town, as granted by the act of assembly of November session, 1784, *ch.* 62, entitled an act for establishing new markets, &c., and also on this express condition, that the said canal, wharves and streets, on each side of the said canal, be a common highway, and free for the public use, and subject to such regulations as the commissioners and their successors shall, from time to time, establish; and on this further express condition, that the said *Dugan* and *M'Elderry* extend *Pratt* street through their two lots of ground on each side of *Market* space, and leave *Pratt* street of the width of 60 feet through their said lots forever, as a street for the public use."

The answer of the *Mayor and City Council of Baltimore* admits the preceding to be a true copy of the application to, and agreement between, the complainants and the commissioners of *Baltimore* town, and insists that under the same, and in virtue of the laws of this State, they are entitled to receive the wharfages which have, and may be received for the use of the wharves, at the head and sides of the canals, made as aforesaid by the complainants, they, the defendants being the sole owners of said wharves, and of the ground whereon they are erected. That by an ordinance, passed in 1801, it was enacted, that all monies, arising to the city from wharfages, be specially appropriated to the improvement and cleaning out of the particular wharves and docks, from which the same was collected, that the said ordinance has been duly carried into effect, and continued in force when the present bill was filed. That the Mayor, in virtue of said ordinance, appointed the complainants commissioners to execute the same in reference to the wharves mentioned in their bill, and that they accepted the appointment, and continued to execute the powers thereby conferred on them until the time of its exhibition. That the defendants now have a right to all the ground on the south side of *Baltimore* street, and running south parallel to *Gay* street,

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for the width of 150 feet to *Water* street, with the right to extend the same to the channel of the basin of *Baltimore*, and that the commissioners erected a market house on the said piece of ground for the use and benefit of the inhabitants, which is now standing.

The bill of the *Mayor and City Council of Baltimore* against *Cumberland Dugan*, which was filed on the 1st of March, 1830, after alleging the facts contained in the foregoing bill and answer, and asserting the right to be in the complainants in this case, proceeds to state, that *Dugan* had received a considerable amount of wharfages, of which it prays an account, that a receiver may be appointed to receive and hold those thereafter to accrue, pending the controversy, and for an injunction, all of which was granted by the chancellor.

*Dugan* answered this bill, affirming the right to be in him.

The two cases were set down for final hearing together, and argued at the same time before the chancellor.

BLAND, Chancellor, on the 13th June, 1831.

These cases standing ready for hearing, and the solicitors of the parties having been heard, they were by consent, permitted to stand over, with leave to amend the pleadings, and the amendment having been made, they were submitted on the 4th inst. and the proceedings read and considered. Upon the whole, I am of opinion that the wharves in the proceedings mentioned, are public wharves, no more liable to wharfage, than any one of the streets of the city are liable to toll. That these wharves, like the streets, are to be regulated and kept in repair at the expense of the city alone, and that for the purpose of protecting the rights and interests of the public, each of these parties must be prohibited from collecting wharfage or toll of any description for the use of these wharves.

The chancellor thereupon ordered the cases to be consolidated, and prohibited and enjoined both parties from re-

ceiving any wharfage or toll for the use of the wharves in question.

From this decree *Dugan* and the *City* prayed an appeal to this court.

The cause was argued before BUCHANAN, Ch. J., ARCHER and DORSEY, J.

*Gill*, for *Dugan* contended,

1. That he is to be considered as an improver, under the act of 1745, *ch. 9, sec. 10*, and entitled to an estate in fee in the wharf in question, of a qualified character; and though made without authority, it was not the design of the legislature, that the port wardens should destroy such improvements, without a previous judicial investigation, nor could they exercise such a power, under the act of 1783, *ch. 24, sec. 9*, consistently with the 18th section of the bill of rights. The mode of proceeding to procure a demolition of the improvement, is designated by the statute, and must be pursued. *Cox's Dig.* 639, 646. 2 *Cranch*, 358, 386. 3 *Cranch*, 338.

2. That the qualification annexed to the estate in *Dugan*, is the right of the corporation of *Baltimore* to extend the marsh market and market house to the channel. That is the only right which the corporation is at liberty to exercise. It can take the property and interrupt the right of *Dugan* for that, but for no other purpose. 1784, *ch. 62*. This right in the city is a mere incorporeal hereditament, and not a legal right to the soil, until it is taken and used for the purposes of the legislative grant. *Canal vs. Rail Road Co.* 4 *Gill and Johns*. 1. It is a right which the commissioners had no power, either to transfer or trammel by contract or agreement, and consequently the arrangement between them and *Dugan* and *McElderry* in 1794, is a mere nullity and void.

3. That until the corporation does require the property in question for a market, *Dugan* has a right to wharfage, as a compensation for his improvement, as far as the public

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think proper to use the wharf, and this under the act of 1745, *ch. 9, sec. 10*.

4. That if upon the construction of the agreement between *Dugan* and the commissioners, *Dugan* had no right to wharfage, neither has the corporation of *Baltimore*.

5. By the act of 1784, *ch. 62, sec. 1*, certain persons were authorised to build and erect a market house on a parcel of ground, beginning on *Baltimore* street, and running south of the width of 150 feet to *Water* street, with the privilege of extending the same to the channel. The market house when erected—the ground whereon the same shall be built, and the privilege aforesaid is vested in the town commissioners. What is the true construction of this act? What estate does it give the commissioners? The legislature designed the market house presently intended to be built, should stop at *Water* street. The house thereafter to be erected might extend to the channel—Hence, it vested a present estate in the house and the *ground whereon the same shall be built*, in the commissioners. It gave them no more estate. Then the privilege is introduced. That gives a right in future, when the privilege should come to be exercised. Its nature would carry the right to reclaim the marsh, and make fast land to the channel. The exercise of the privilege must carry the fee. But still, this is but a privilege, and no immediate estate in the soil. In the mean time it was subject to the act of 1745. It was not intended that this noxious marsh should not be reclaimed by the adjacent proprietors, as in other cases, reserving the public right whenever the trade, extent of population, or judgment of the town authorities should make it necessary to extend the market house. That time has not arrived; and hence, the improvers, who have conferred a great benefit upon the public at large, out of their private fortunes, ought to have the incidental advantage of wharfage. The court can only regard the privilege created by the act of 1784, as a limitation upon the right which the improvers, as water lot proprietors have, under the act of 1745. Their



estate to continue valid until the privilege comes to be exercised ; and this view does justice to all. If these views are erroneous then there is no equity, looking to the letter and spirit of the permission of 1794, in giving the city of *Baltimore* wharfage, while it is refused to the proprietors. The word “*free*,” in the permission, means free to all, and free for all purposes. Common highways are not burthened with tolls, except where the law enacting them, expressly so declares, which is not the case here.

*Belt and Johnson*, for the *Mayor and City Council of Baltimore*.

The bill of 1831 is alone to be regarded, and that bill asserts no right under the act of 1745. It refers, for the rights of *Dugan* and *McElderry*, exclusively to the agreement of 1794. There can, therefore, be no necessity for inquiring into rights which may have been acquired under the act of 1745, though none such as is asserted on the other side, could have been so acquired ; because the act of 1784, *ch.* 62, vested the right to improve the property in question, in the city commissioners. After the passage of the act of 1784, it is impossible that *Dugan* and *M' Elder-ry* could be authorised to make these improvements, without the consent of the commissioners, as the whole power was conferred on them by that act. The case therefore depends on the agreement of 1794—act of 1762, *ch.* 34. All the rights and powers of the commissioners were by the act of 1796, *ch.* 68, transferred to the present corporation of *Baltimore*. By the answer of the commissioners to the application of *Dugan* and *M' Elderry* in 1794, all the rights of the former, under the act of 1784, are reserved. If *Dugan* has a right to charge wharfage, he has an equal right to charge tolls for navigating the canal, and from passengers on the streets. The terms of the act are the same with respect to each. By the permission granted by the commissioners, the wharf, &c. is to be *free* for the public use, and yet if the right claimed exists, the charges may be so ex-

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travagant as to preclude the public altogether from the use of them. If the act of 1745 gives *Dugan* the right demanded, then as that act in relation to the subjects to which it applies, gives a fee in the property improved, he might have appropriated the whole to himself as private property. There can be no doubt that the improvement was made under the agreement, or permission of 1794, the only construction of which is, that the wharves, &c. thereby authorised to be made, should be for the public use, free of expense.

On the appeal of the city they contended that the act of 1784 expressly gives to the commissioners the privilege of extending the 150 feet front to the channel, and not merely to extend the market house, and the ground when extended, vested in the commissioners, to be applied by them to any purpose they might think proper, for the advantage of the town of *Baltimore*. And the rights conferred by the act of 1784, never have been attempted to be impaired by subsequent legislation. It will not do for *Dugan* to say that the wharf is free under the permit of 1794, because he is now himself asserting the right to exact wharfage for his own emolument. By the permit, *Dugan* was only to make the improvements. He was under no obligation to keep them in repair. This the city is bound to do, and it would be strange if they are not entitled to the profits, out of which they might do so. These profits are the appropriate fund for defraying the expense—act of 1783, *ch.* 24. And in point of fact, the funds thus derived, have been so applied by the city. *Ord.* 24th April, 1797—19th March, 1798—21st March, 1801.

The true construction of the agreement of 1794 is, that as to *Dugan*, the wharf was to be free, but as, under the reservation, it was to be subject to such regulations, as the commissioners should prescribe, the right of the city to charge wharfage was not impaired. The right to regulate carried with it the right to collect wharfage, as a necessary part of the power reserved. There can be no doubt, that

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when the wharf was completed, the fee was in the commissioners; they having the right to resume it, when, and for any purpose they pleased; and of course they could resume it for the purpose of charging wharfage. The agreement of 1794 dedicates the wharf, when made, to the public. *Dugan*, as an individual, can claim no right under that agreement. The public by the contract is the grantee, and it might of course, impose any incumbrance it thought fit upon its own rights, and the right of the corporation is admitted by the act of 1813, *ch.* 118. By this act the *past* right of the city is conceded, and the act only denies, the right for the future; and the law being found injurious was repealed by the act of 1827, *ch.* 162, which expressly confers upon the city the right to charge wharfage for the future. The *ordinance* of 27th February, 1826, authorised the *Mayor and City Council* to collect wharfage on this identical wharf, and this ordinance was in force when the act of 1827 was passed.

DORSEY, J., delivered the opinion of the court.

The appeal of *Dugan* and *M' Elderry* against the *Mayor and City Council of Baltimore*, will first be considered. The right of the appellants to collect the wharfage in question, has in the argument, been asserted to arise under the act of assembly of 1745, *ch.* 9, *sec.* 10; which, in reference to the town, now city of *Baltimore*, declares "that all improvements, of what kind soever, either wharves, houses, or other buildings, that have, or shall be made out of the water, or where it usually flows, shall, as an encouragement to such improvers, be forever deemed the right, title, and inheritance of such improvers, their heirs and assigns forever." But this act of assembly gives no support to the claims, in aid of which it has been invoked. The improvement made by *Dugan* and *M' Elderry*, in front of the market house lot, is not such an improvement as is justified by that act of assembly. So to construe it, would be to give it a literal, not a sound, or rational interpretation. The im-



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provements authorised and encouraged were those made by improvers in front of their own lots, not of their neighbors. The legislature never designed such invasion of the rights of private property; nor indeed had they the power to legalize it, if such had been their intention. But if this act of assembly could have sustained the appellant, he has waived all claim to relief under it, by withdrawing his first bill of complaint, and filing his third as a substitute therefor. His title to wharfage, if it existed at all, is derived from the permission for his improvement, granted in 1794, by the commissioners of *Baltimore* town. This permission, or contract, if it may be so called, is, it has been insisted, on the part of the appellants, a nullity, and discharged of all obligation as respects *Dugan*; because the town commissioners having, under the act of 1784, *ch.* 62, no power to extend their grounds but in the extension of the market house, could confer no such authority as that which had been exerted by *Dugan* and *M'Elderry*. This assertion is in direct contradiction to the positive allegations contained in their bills. To ascertain its correctness, however, it becomes necessary to examine into the nature and extent of the interest of the town commissioners in the market house property, and the "privilege" of extension therewith conferred. If, as is alleged, this "privilege" was nothing more than the extending the market house to the channel of the basin, it is evident that *Dugan* and *M'Elderry* derived from the commissioners no such authority as that which has been exercised under the permission.

The solution of this inquiry depends entirely on the true construction of the second section of the act of 1784; which enacts that *Samuel Smith* and others, "shall have full power and authority by this act, to build and erect a market house on a parcel of ground, situate in the said town, opposite *Harrison* street, beginning on *Baltimore* street, and running thence south, parallel with *Gay* street, of the width of one hundred and fifty feet, to *Water* street, with the privilege of extending the same to the channel; and



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that the said market house, when erected, and the ground whereon the same shall be built, with the privilege aforesaid, shall be, and is hereby declared to be vested in the said commissioners of *Baltimore* town and their successors forever, from and immediately after the said market house shall be built and erected; to hold, possess, and enjoy the same market house, ground and privilege aforesaid, to and for the use and benefit of the said town, in as full and ample manner as if the said commissioners had been legally constituted a body politic and corporate, in deed and in name; provided always, that the said *Samuel Smith* and others, shall erect and build the said market house in a good substantial workman-like manner, according to such plan and dimensions as the commissioners of *Baltimore* town shall approve, on or before the first day of March, in the year one thousand seven hundred and eighty-seven." What vested in the *commissioners of Baltimore town*, under this legislative provision, is the question to be determined?

That the market house, when built, passed to them is undeniable; but what quantity of ground was transferred with it, is a matter not so self-evident. To give to this enactment a superficial examination, a literal interpretation, and it might be said, that no more ground passed to the commissioners than that which the market house built, actually occupied. But when we advert to the size of the ground, the privilege conferred as to its extension, the nature of a market house, its probable dimensions, the facilities necessary to its beneficial enjoyment, and the benevolent designs of the legislature manifested in relation thereto; it is impossible to doubt that they intended to vest in the commissioners the entire ground described. Give to their act a different exposition, and the market house is stript of its most valuable, nay, inseparable appendages; it no longer exists as of public utility. Houses might be built in immediate contact with its sides; and wagons, carts, and such other vehicles as usually attend a public market, are wholly excluded,

there being no place appropriated for their reception. Whoever saw, or heard of a market house without public avenues, or highways on its sides, for the accommodation of the public? That it was intended for the market house to cover the entire ground by being erected of one hundred and fifty feet in width, is an idea too absurd to be indulged for a moment; indeed, it is distinctly repudiated by the conclusion of the foregoing section of the law, which provides, that the market house shall be built of such plan and dimensions as the commissioners shall approve. If the legislature meant to convey nothing more than the ground actually covered by the market house, what motive could have prompted them to transfer the privilege, not only of extending to the channel the lot occupied by the market house, but also the water front of the lots on the east and west sides of it? Our construction of this clause of the act of assembly, in relation to the limits of the ground which was granted, is not only consistent with the spirit and objects of the law, but is in accordance with its terms and expressions. It describes the ground suitable for the purpose, authorises the erection of the market house thereon, and then grants the market house, with the ground on which it is built. On what ground was it built? On that ground which was described and appropriated for that purpose. The entire parcel of ground clearly passed to the town commissioners.

It was contended in the argument that in the grant of the "privilege of extending the same to the channel," the relative term "same," there used, referred to the market house, and not to the ground whereon it was to be erected. If such was the design of the general assembly, it is difficult to conceive by what motives they were actuated. What? extend a market house fourteen hundred feet through the marsh, and into the water, to the very channel of the basin, and leave in contact with each side of it, such a marsh and depth of water as would preclude all possibility of approaching it, but through its northern extremity. It has been common to grant the privilege of extending lots of ground into

the basin; but it is perhaps the first time that it was ever alleged, that an authority was granted to extend houses into navigable water. There is, however, nothing to warrant this construction. According to the obvious meaning and grammatical interpretation of the sentence, the relative, "same," agrees with its more immediate antecedent "ground;" and the ground referred to, is the market house lot of one hundred and fifty feet wide. That the "privilege" thus conferred, with the ground which might be reclaimed under it, were vested in the town commissioners in fee simple, there is no room for the suggestion of a doubt. But it is insisted on in the bills of complaint, and in the argument at bar, that its use and enjoyment by the city, is exclusively limited to the erection of a market house thereon. If such was the intention of the legislature, it is impossible to collect it from their act. They have used no words of limitation, or restriction, as to the purposes to which this extension of ground was to be appropriated, nor can any be inferred from the nature of the grant, its subject matter, nor any of the circumstances attending it. On the contrary, they declared that this "privilege," shall vest in the commissioners of *Baltimore* town and their successors forever, "to, and for the use and benefit of the said town." Thus leaving the mode of its enjoyment, the purposes to which it was to be applied, to the sound discretion of those, who were created the trustees, or guardians of the interests of the town. These commissioners acting in its behalf, and for its benefit, might have improved this "privilege" themselves, by filling up from time to time, or at any time, this immense space, or any part of it; or employed, or permitted, upon such terms and conditions as to them seemed reasonable and just, other persons to do so. Under this power, and in virtue of their permission, the improvement of *Dugan* and *McElderry* has been effected. Their rights then, over the wharves and ground, extended in front of the market house lot, depend altogether upon the construction that may be given to the permission they



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received from, or in other words, the contract they made with the town commissioners. Upon this subject, as far as *Dugan* and *McElderry's* claim to wharfage is concerned, we think the permission or contract under which they acted too explicit, and unambiguous, to permit us to entertain even a momentary doubt. In the wharves and canal to be constructed, the town commissioners neither gave, nor intended to give to *Dugan* and *McElderry*, any right of domain, or of property. Their attempt to charge wharfage, therefore, has no colorable pretext to support it, and is a violation of the spirit and meaning of that condition imposed by the town commissioners, which declares, "that the said canal, wharves, and streets on each side of said canal, be a common highway, and free for the public use." A distinct annunciation to *Dugan* and *McElderry*, that they had no right therein, but in common with the rest of the community. Great stress appears to be placed on the fact, that the canal and wharves were made by *Dugan* and *McElderry* at an immense expenditure of money, and that the health, and commerce of the city, have been greatly promoted by their "improvement," and we are left to infer, that all this has been done with the most patriotic public spirit, and disinterested motives; with a single eye to the public benefit;—that this effort by the corporate authorities of the city of *Baltimore* to deprive them of this wharfage, their only return for this enormous expense of money and labor, is an act of ingratitude, persecution, oppression, and injustice, which should excite the indignation and sympathies of this court.

Are these grievances complained of, well founded? Were these the considerations that induced the complainants to engage in their laborious and expensive undertaking? Is this wharfage the only remuneration they receive for their inordinate sacrifices? A slight comparison of their condition before, and after the completion of their improvement, will rectify any misapprehension on this subject, that might otherwise arise.



In 1794, *Dugan* and *McElderry* were the owners of two lots fronting on the water, and adjoining the market house, the one being on the west side of it, the other on the east. Whether the front of each of those lots was 30, 40, 50, or 100 feet on *Water* street is not shown by the record. Suppose *Dugan* and *McElderry* had extended their lots into the basin to the channel, or port wardens' line, without any additional extension under the town commissioners' privilege; how many feet of water front, or wharf property would they have been entitled to? As many feet, and no more, as their lots fronted on *Water* street. What length of wharf would they have been compelled to make to attain that object? Precisely the same length of wharf, except eight feet on *Pratt* street, which they have now made; the wharves on the sides of their lots, binding on the market house lot "privilege" being indispensable to prevent the earth, with which their lots was filled, from washing away and filling up, and destroying the navigation of the basin. Their net gain of water front, or wharf lots under the permission of the town commissioners is two thousand feet, perhaps ten times as much navigable front on the water, as they could legally have acquired, by availing themselves only of their own water rights. By this operation they have rendered their property, in all probability, at least four or five times as valuable as it would otherwise have been. And what compensation do the *Mayor and City Council of Baltimore*, (who under its charter are clothed with all the powers of the town commissioners,) receive as territorial proprietors of their "privilege;" for its enjoyment by *Dugan* and *McElderry*? According to the pretensions of the latter, not one farthing. And furthermore, agreeably to that part of the chancellor's decree, relative to the repairing of these wharves, (which is unquestionably correct,) the corporation are bound to bear the whole burden of repairs. This to be sure, would be a left handed, unilateral bargain with which it would be difficult to find a parallel. Seeing no equity in the claims of the complain-

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ants, *Dugan* and *McElderry*, their several bills of complaint against the *Mayor and City Council of Baltimore* ought to be dismissed with costs, as concerns *Dugan* and *McElderry*, both in this court and in the Court of Chancery; but without costs so far as the widow and heirs of *McElderry* are concerned; and the injunction issued in those cases is dissolved.

Having disposed of the cases of *Dugan* and *McElderry* against the *Mayor and City Council of Baltimore*; our next duty is to examine, upon the bill filed by the latter against *Cumberland Dugan*, what right the corporation of *Baltimore* have to collect the wharfage to which, by their bill, they have made claim. To make this examination, we must settle the true construction of the permission, by which the commissioners of *Baltimore* town authorised the "improvement" made by *Dugan* and *McElderry*; according to which we think, that no right of property or domain passed to them, in the canal, wharves, and streets constructed under the commissioners' "privilege." But that the same, vested in the said commissioners, in the same manner, that they would have done, had the "improvement" been made by themselves; except so far, as their powers were abridged, by that condition attached to their permission, by which it was declared that "the said canal, wharves and streets, on each side of the said canal, be a common highway, and free for the public use, and subject to such regulations as the commissioners and their successors shall from time to time establish." If to ascertain the meaning of this stipulation, we could look to the acts of the parties from the time when their stipulation could have been brought into operation, until the present moment, it is most manifest, that neither party supposed the right of wharfage was extinguished. Both parties admitted the existence of the right; the only controversy was, by whom it should be exercised. Over the wharfage collected at private wharves, or wharves other than those owned by the town or city of *Baltimore*, or made at the ends or sides of public streets,

lanes and alleys, the town or city officers have no power or control. Its imposition and collection, is the exclusive privilege of the wharf owners; with it, the officers of the town or city have no concern. It is otherwise with wharfage collected at wharves owned by the town or city, or at the ends or sides of the streets, lanes or alleys: all these are called public wharves; are common highways, free for the use of the public; but at which tolls were collected by the town, now city, officers.

In declaring the wharves on *Market* space, common highways, and free for the public use, the commissioners never designed to surrender their proprietary right; further than that the wharves should not be held as private wharves, under the absolute dominion of their owners; to which no vessel can approach, or make fast without the consent of the proprietors: but that they should be “free,” that is, (according to its obvious as well as literal sense,) *open* for the public use. They meant nothing more, than that the use of those wharves should be the common privilege of all; but never intended to relinquish the natural, inherent right, incident to their title of collecting a reasonable and customary wharfage. They do not agree that it shall be a highway for the use of the public, free of wharfage, or expense; but simply, that it should be a common highway, “free,” or (to use another word of the same import,) *open* for the public use; leaving to the proprietors of the soil, their natural, inherent right of collecting a wharfage. All our turnpike roads are common highways, and free for the public use, but not free from the collection of tolls. A wharf may be free from wharfage, and yet not a highway, or free for the public use; or it may be a highway, and free for the public use, and yet not free from wharfage.

From the nature of the permission, and circumstances attending it, granted to *Dugan* and *McElderry* by the town commissioners, ought we to infer a surrender of their rights of domain, beyond the terms of their stipulations? *Dugan* and *McElderry* acquired, what was clearly the object of



their application, an immense additional water front, and highways, or streets in front of their numerous warehouses, which they had in contemplation; and which they have told us, they subsequently built. It was no part of their application, that "the canal, wharf, and streets when made should be *free* for the public use." The only requisition, in their application was, that they should "be made public for the use of the inhabitants, under the laws and regulations of the town commissioners." Is it then rational to presume, that when it was not even asked for, these commissioners by using the word "*free*" where they have used it, designed to relinquish an inherent, and unquestionable right, of great value to the town, and their only direct advantage, or income resulting from the "*improvement*," whilst at the same time, they imposed upon *Baltimore* the new burden of keeping these wharves and streets in repair, and of furnishing at its own expense, officers to enforce such regulations as the said canal, wharf, and streets might render it necessary for them to establish? Strip them of this claim to wharfage, the essence of their right of domain, and there is no more reason, or justice in holding them bound to repair these wharves, and incur the expense of these regulations; than there would be in requiring them to repair and regulate every private wharf in the city.

Was this asserted exemption from wharfage, deemed essential or appurtenant to the warehouses; the erection of which was the great object of the improvement? The acts of *Dugan* demonstrate the contrary. He always denied its enjoyment to the occupants of the warehouses, and exercised himself the right of collection, as separate from, and independent of such occupation.

Can any thing be more reasonable and just, than this claim to wharfage? The city of *Baltimore* as proprietor is bound to cleanse the canal, and to regulate and repair those wharves and streets. The natural fund to defray the necessary expenditure of which, is what? The wharfage; an income derived from those who enjoy the benefit of this



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expenditure. We cannot then by a technical strained construction of the word "free," which those who used it could not have intended it to bear, invert the natural order and fitness of things, and deprive the city of *Baltimore* as a freeholder, of its inherent rights of emolument, and at the same time impose on it all the correlative burdens.

In doing so we think the chancellor erred, and therefore reverse his decree, with costs to the appellants in this court, and in the Court of Chancery. The injunction issued against *Cumberland Dugan* should have been made perpetual, and a decree to account, passed in the usual form; for which purpose, and that the chancellor may pass such orders and decrees in the case, as are requisite to give full and final relief to the complainants, according to their equities, this cause is remanded to the Chancery Court.

DECREE REVERSED, AND CASE REMANDED TO THE  
COURT OF CHANCERY FOR FURTHER PROCEEDINGS.

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**HICKLEY, TRUSTEE OF THOMAS CLAGETT vs. THE PRESIDENT AND DIRECTORS OF THE FARMERS AND MERCHANTS' BANK OF BALTIMORE, et al.—June, 1833.**

By the common law, and apart from the provisions of the insolvent laws of this State, a debtor may secure one creditor to the exclusion of others, either by payment, or a *bona fide* transfer of his property.

Under the settled construction of the acts of 1812, *ch.* 77, *sec.* 1, and 1816, *ch.* 221, *sec.* 6, the words, "with a view or under an expectation of being or becoming an insolvent debtor," used in those acts, are held to mean, with a view or under an expectation of taking the benefit of the insolvent law.

Where the permanent trustee of an insolvent debtor proceeded in equity to set aside the judgment confessed by the insolvent prior to his application for a release under the insolvent laws, upon the allegation that the judgment was confessed under the expectation of becoming an insolvent debtor, and enabled the plaintiff, creditor, to pay himself by his levy upon

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the defendant's property in preference to other creditors, and in support of his case examined the insolvent as his witness, who deposed, that he was in fact insolvent when he confessed the judgment, "but that he hoped at that time to be able to settle with his creditors; that he had not then the slightest idea of taking the benefit of the insolvent laws, and contemplated no such alternative, not having thought on the subject at the time referred to;" there being no evidence in the record to control the insolvent's proof, or showing the existence, at the time of the confession, of any such expectation: **Held**, that the transaction must be left to its operation at common law, and being *bona fide*, and for a sufficient consideration must be sustained.

By the act of 1827, *ch. 70, sec. 7*, confessed judgments were declared within the operation of the insolvent laws, except in the city and county of *Baltimore*; and by the acts of 1830, *ch. 65*, and 1831, *ch. 316, sec. 5*, the like principle applies to confessed judgments in the city and county of *Baltimore*; prior to these acts judgments had not been considered preferences within the meaning of the insolvent laws.

The present bill was filed by the appellant, *Robert Hickley*, permanent trustee of *Thomas J. Clagett*, on the 1st of October, 1829. It alleged, that *Thomas J. Clagett* on the 26th of May, 1829, applied to the commissioners of insolvent debtors for the city and county of *Baltimore*, for the benefit of the insolvent laws, and that the complainant in the due course of said application, and proceedings thereunder, was appointed his permanent trustee, and that he has given bond with approved security as such. That the debts due from the insolvent at the time of his application remain unsatisfied, and that his effects in the hands of his trustee are wholly insufficient for that purpose. That said insolvent being about the 1st of May, 1829, indebted to the *Farmers and Merchants' Bank of Baltimore*, in about the sum of \$1600, and being then, as was known to said *Bank*, in fact insolvent, was induced by it to confess a judgment for the amount of the said debt, for the purpose of giving to said *Bank* an undue and improper preference over the other creditors. That at the time this judgment was confessed, the said *Clagett* had it in contemplation to apply for the benefit of the insolvent laws; and that it was a part of

the arrangement between the said *Clagett* and the *Bank*, that an execution should immediately issue on said judgment, which did in fact issue, and a great part of the personal property of the insolvent was taken under it, and sold, and the proceeds applied to the payment of the aforesaid debt. The prayer of the bill is, that the *Bank* account and pay over to the complainant, the value of said property so seized, and sold under the aforesaid execution, and for general relief.

The answers of the *Bank* and *Clagett* admit the judgment, the execution, and sale of the property of the latter, and that the proceeds thereof was paid over by the sheriff, towards the satisfaction of the debt due the *Bank*, as charged in the bill. *Clagett*, in his answer, denied that he contemplated, at the time the judgment was confessed, being or becoming an insolvent debtor, or giving the *Bank* an undue and improper preference; and the *Bank* denied that they had any understanding with that view with *Clagett*; their object being, as they alleged, merely to secure their own claim, without any reference to the rights of others, and without knowing that *Clagett* contemplated applying for the benefit of the insolvent laws. The application by *Clagett*, for the benefit of the insolvent laws, at the time stated in the bill, and the appointment of complainant as his trustee, was also admitted.

A commission issued to take evidence, under which *Clagett*, the insolvent, was examined under an order for that purpose, passed by the chancellor, upon the application of the complainant. He stated among other things, that at the time he agreed to confess the judgment to the *Bank*, he was in fact insolvent, but that he hoped at that time to be able to settle with his creditors, and that he had not then the slightest idea of taking the benefit of the insolvent laws. That he contemplated no such alternative, not having thought on the subject at the time referred to.

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BLAND, Chancellor, at March term, 1831, dismissed the complainant's bill with costs, who thereupon, brought the case by appeal to this court.

It was argued before BUCHANAN, Ch. J., and MARTIN, ARCHER, and DORSEY, J.

*Mayer*, for the appellant.

The confession of the judgment by agreement, and the seizure of *Clagett's* effects under it, constitute an undue preference from him to the *Bank*; and under the provisions of the insolvent laws; and independent too, of any provision of those acts against preferences to creditors, the proceeding in question, on the part of the *Bank*, and *Clagett* is, as to the appellant, as permanent trustee, a nullity, and the *Bank* is answerable to the trustee for the full value of the property thus unduly appropriated. He referred to the acts of 1807, *ch. 55, sec. 2*, 1812, *ch. 77, sec. 1*, 1816, *ch. 221, sec. 6*, 1805, *ch. 110*. The *Wm. King*, 2 *Wheat.* 141. *Sheps. Touch.* 145. 1 *Bac. Abr.* 429. 3 *Com. Dig.* 110. 3 *Bac. Abr.* 297, 298, 321. *Rob. on Frauds*, 489. *Frasier, Jr. vs. Frasier*, 9 *Johns. Rep.* 80. *Wilkinson vs. Wilkinson*, 3 *Swanst.* 529. *Benson vs. Le Roy*, 4 *Johns. Ch. Rep.* 651. *Livingston vs. Hubb, et. al.* 2 *Johns. Ch. Rep.* 512.

*Dulany* and *G. H. Brice*, were stopped by the court.

BUCHANAN, Ch. J., delivered the opinion of the court.

By the common law, and apart from the provisions of the insolvent laws of this State, (the bankrupt laws of *England* not being in force here) a debtor may secure one creditor to the exclusion of others, either by payment or a *bona fide* transfer of his property. The 9th section of the insolvent act of 1805, *ch. 110*, denies the benefit of that act to any debtor found guilty of having given to any creditor or security, an "undue and improper preference," leaving doubtful what constituted an undue and improper prefer-



ence. And to remove that doubt, the act of 1807, *sec. 2*, provides that any deed, &c. made by any person, to any creditor or security, *with a view, or under an expectation of being, or becoming an insolvent debtor, shall be taken to be an undue and improper preference* to such creditor or security, *within the meaning of the original act of 1805*. Neither the original act of 1805, nor the supplement of 1807, renders void or inoperative a deed, &c. given *bona fide* by a debtor, to secure a favored creditor or security, but they rather virtually recognize the validity of such a deed. The act of 1807, only declaring what shall be deemed *an undue and improper preference*, and the act of 1805, doing no more than by way of punishment, denying to a debtor giving such preference, the benefit of its provisions, without impairing the rights of the preferred creditor under such deed, and leaving it to its operation at common law.

But the acts of 1812, *ch. 77, sec. 1*, and 1816, *ch. 221, sec. 6*, the latter relating to the city and county of *Baltimore*, provide, that any deed, &c. made to a creditor, or security, by any person, with a view or under an expectation of being, or becoming an insolvent debtor, and with intent thereby, to give an undue and improper preference to such creditor or security, shall be void, and that the title to the property shall vest in the trustee of such insolvent debtor. Thus for the first time making void such a deed of preference, given with a view, or under an expectation of being or becoming an insolvent debtor; which would have been supererogation, if such deeds had been considered void before. Under the settled construction of those acts, the words, "with a view, or under an expectation of being or becoming an insolvent debtor," are held to mean, *with a view, and under the expectation of taking the benefit of the insolvent laws*; and if the judgment confessed by *Thomas J. Clagett*, who was a resident of the city of *Baltimore*, could be considered as within the intent and meaning of those acts, and had been given *with a view, or under an expecta-*

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tion of taking the benefit of the insolvent laws, and with an intent thereby to give an undue and improper preference to the Bank, it would have been null and void, and the property taken under the execution sued out upon it, would have vested in his trustee.

But the appellant thought proper to make *Thomas J. Clagett* a witness, and to examine him as such, and he has positively, and unequivocally sworn, that he did not confess the judgment with a view, or under an expectation, or intention to take the benefit of the insolvent laws; and there is no evidence in the record, to control his showing the existence at the time, of any such view or expectation. It is therefore a transaction wanting the ingredients of such an undue and improper preference, as is declared by the insolvent laws to be void; and is consequently left to its operation at common law, by which, being *bona fide*, and for a sufficient consideration, it is sustained.

The act of 1827, *ch. 70, sec. 7*, provides that the voluntary confession of a judgment in favor of a creditor, or security by any person, with a view, or under an expectation of being or becoming an insolvent debtor, shall be an undue and improper preference, within the intent and meaning of the act of 1805; with a proviso, in the 9th section, that it shall not extend to the city and county of *Baltimore*. Thus showing, that before that time, such judgments had not been considered as being within the meaning of the act of 1805; and by the proviso, giving validity and effect to such judgments in the city and county of *Baltimore*.

But by the act of 1830, *ch. 65*, a judgment so confessed in the city or county of *Baltimore*, is declared to be an undue influence, an improper preference, and null and void. And by the act of 1831, *ch. 316, sec. 5*, the provisions of the 7th section of the act of 1827, *ch. 70*, are extended to the city and county of *Baltimore*,—so that the judgment in this case, which was confessed by *Thomas J. Clagett*, in the city of *Baltimore*, on the first day of May, in the year 1829, before the passage of the acts of 1831, is protected

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by the proviso in the 9th section of the act of 1827, and would not be void under the provisions of the insolvent laws, even if it had been confessed with a view, or under an expectation of being or becoming an insolvent debtor.

DECREE AFFIRMED WITH COSTS.

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JOHN R. BERNARD vs. GEO. TORRANCE, Survivor of  
E. S. BUCHANAN.—*June, 1833.*

T and B were partners carrying on business in *Baltimore*, under the name of the Warren Factory. The business was conducted exclusively by a *general agent* for the partnership, who on the 15th April, wrote to O in New York, as follows : "at 18 cts. four months, you may forward 10,000 lbs. of gum, and if you accept this offer, let me know by return mail that I may regulate my foreign orders." On the 16th, T retired from this partnership. **Held**, That the true construction of this offer is, that unless the agent received the notification of its acceptance by return mail, or by some other mode of conveyance equally as speedy, it was not to be considered as a binding offer; that if the offer in this respect was not complied with, T, the retiring partner, was not bound by it, and that this was a fact exclusively for the consideration of the jury.

To constitute the offer of an agent, the contract of his principal, it must have been accepted according to its terms, and whether it was so accepted, is a question of fact for the jury.

Where the proposal of an authorised agent to purchase merchandise is accepted, and substantially complied with, by the vendor, his principal is bound, though between the offer and the acceptance, the principal revokes his authority; and this is so, whether the principal is known to the other party or not.

Principals when discovered are ordinarily liable for the contracts of their agents.

A principal authorising an agent to make an offer cannot withdraw to the prejudice of him to whom the offer is made; the liability after the offer is made must continue, if it be accepted; for it is the principal's own offer, though made through an agent. The acceptance must be according to the terms of the offer.

After an agent's power has been revoked, he has no authority to enter into new negotiations, and of course cannot then dispense with conditions



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attached to proposals previously made by him, so as to bind his principal. Any new stipulation or dispensation with previously offered stipulations, would make the agreement, not the acceptance of the one offered, but a new agreement.

Where an agent proposed to purchase 10,000 lbs. of gum, and directed the vendor to forward it to him, the fact that the vendor consigned the gum to his own correspondent, with directions to deliver it upon arrival, or that he shipped more gum than was ordered, which larger quantity was accepted on its arrival by the agent, who gave his note therefor, cannot be considered as making a new contract, as to the 10,000 lbs. between the agent and vendor at the time of its actual delivery, nor as a variation from the design of the original agreement.

A retiring partner may be discharged from the debts of the partnership, by the acceptance by the creditor of new notes of the other partners, as renewals of the notes first given, provided the vendor agreed to discharge him by the acceptance of such new notes ; which is a question for the jury—but where the new notes corresponded entirely with those first given, as where they were all signed by, I as agent, and the creditor was ignorant of any change in the partnership, no agreement to discharge can be inferred.

Where a retiring partner does not give notice of his withdrawal, he remains responsible to those who knew he had been a partner, who are ignorant of his withdrawal, and give credit to those who afterwards carry on business in the partnership name.

Evidence that it was not generally known in the place where a certain partnership was carried on, that T was a partner, is admissible to the jury, where the inquiry is, whether the plaintiff knew that the defendant was a partner in order to make him liable. General evidence that he was known as a partner, is also admissible under such circumstances.

### APPEAL from *Baltimore County Court*.

This was an action of *Assumpsit*, instituted by the appellant against the appellee, and *E. S. Buchanan* (who died pending the suit) on the 30th of June, 1830. Issue was joined upon the plea of *non-assumpsit*, and errors in pleading on both sides, were waived by agreement.

1. It was proved at the trial, that *George Torrance* and *E. S. Buchanan* carried on a large manufactory near *Baltimore*, through the sole agency of *James A. Buchanan*. The business was conducted under the style and name of the *Warren Factory*, by *James A. Buchanan*, as agent. There was no ostensible change in the manner of conduct-



ing it, from 1827 to September, 1830. The plaintiff was a merchant at *New York*. On the 13th April, 1829, his agent, *G. S. Oldfield*, offered to sell *James A. Buchanan* a quantity of *Senegal* gum at a price which he refused to accept. On the 15th April, *Buchanan* made a proposal by letter to the plaintiff's agent, *Oldfield*, at *New York*, for a quantity of gum, an article used in the manufactory. He wrote to this agent, "at 18 cts. four months, you may forward 10,000 lbs. and if you accept this offer, let me know by return mail, that I may regulate my foreign orders." This letter reached *New York* on the morning of the 17th, on which day at 2 o'clock the mail left *New York* for *Baltimore*. *Oldfield* did not reply to this letter, but communicated its contents to his principal, the plaintiff, who, on the 18th April, shipped 10,892 lbs. of gum at *New York*, consigned to his agents, *Oldfield, Trull & Co.* at *Baltimore*, with instructions to deliver it to *Buchanan*. On the 20th April, *Buchanan*, at the counting room of the *Warren Factory*, was notified of the shipment, did not dissent to it, and on the 29th April, received the gum, and gave his note, as agent, for the 10,892 lbs. at the price mentioned in his letter of the 13th. This note not being paid, was renewed twice, and the last renewal was exhibited by the plaintiff, at the trial, still unpaid.

The defendant, *Torrance*, sold out his interest in the *Warren Factory*, upon the 16th April, to the co-defendant, *E. S. Buchanan* (who is since dead) and others, for \$60,000. Notice of his retiring from the Factory, was published in *Baltimore*, on the 11th May, 1829. The defendant *Torrance*, held the legal title to the land upon which the factory was erected, and gave a bond of conveyance for it, on the 20th April, 1829. He had held that title from 20th April, 1824. On the 11th March, 1829, *James A. Buchanan* lodged the proof of his agency with the *President and Directors of the Union Bank*, signed by *Torrance*, and dated 20th September, 1828. *J. A. Buchanan*, as agent of the *Warren Factory*, previous to the 13th April, 1829,

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had had dealings with the plaintiff's agent at *New York*, to whom he made the proposal for the purchase of the gum. Neither the plaintiff nor his agents knew that *Torrance* had retired from the *Warren Factory*.

The object of the action was to recover from *Torrance* the price of the gum sold and delivered to *Buchanan*, as agent of the *Warren Factory*.

At the trial, after the preceding evidence had been in substance given, the defendant proposed to prove by several persons, merchants and creditors of the *Warren Factory*, and for many years before and after April, 1829, residents in *Baltimore*, that they did not know that the defendant was at any time interested in said factory, and that they did not believe that it was generally known in the city of *Baltimore* or elsewhere, that the defendant had been concerned therein. To the admission of which proposed evidence, the plaintiff objected, but the court overruled the objection, and permitted the same to go to the jury: the plaintiff excepted.

The defendant, by his counsel, then prayed the court to instruct the jury, upon the whole case.

1. That if the jury believe, from the evidence, that the interest of the defendant in the *Warren Factory*, terminated on the 16th April, 1829, and that from that time he ceased to have any concern as a partner in said factory, and that the same was thereafter carried on, not on his account, but on the sole account of other persons, or of some other person, that then the contract, *as given in evidence by the plaintiff, for the sale of the gum, upon which the present suit is brought, is not binding upon the defendant*, and that then the plaintiff is not entitled to recover in this action; provided the jury also believe, from the evidence, that neither the plaintiff nor his agents, through whom the said contract was made, did know or believe, either when the offer to make said contract was made, or from that time until such contract was consummated, that the defendant was a proprietor of the said *Warren Factory*.

2. That if the jury find from the evidence, that the defendant ceased to have an interest in the *Warren Factory* on the 16th April, 1829, and that thereafter the same was carried on by *James A. Buchanan*, as agent for, and on the sole account, and for the sole benefit of other persons than the defendant; and if the jury also find from the evidence, that neither the plaintiff nor his agents, in making said contract, knew or believed that the defendant was one of the proprietors of said factory; and if they also believe, that the interest of said defendant, as one of the proprietors in said factory, or as concerned therein, was not generally known in the city of *Baltimore* or elsewhere, that then the contract given in evidence by the plaintiff, and upon which the present action is brought, is not binding upon said defendant, and that the plaintiff is therefore not entitled to recover in this action.

3. That if the jury find from the evidence, that the contract given in evidence by the plaintiff, and upon which he seeks to recover in this action, was made by *James A. Buchanan*, as agent of the proprietors of the *Warren Factory*, after the defendant ceased to be one of said proprietors; and if the jury also believe, that neither the said plaintiff nor his agents, in making said contract, ever knew or believed, that the defendant was one, or had been one of said proprietors; and if they also believe, that the defendant, having been one of said proprietors, was not generally known in the city of *Baltimore* or elsewhere, and that said plaintiff did not look, in making said contract, to the responsibility of the defendant, that then said contract is not binding upon said defendant, and that therefore the plaintiff is not entitled to recover in this action.

4. That before the plaintiff is entitled to recover under the prior prayers of the defendant, the jury must believe, that the plaintiff or his agents did, at some time, know that said *Torrance* was a proprietor of said factory. Which instructions the court accordingly gave. The plaintiff excepted.



The plaintiff and defendant having given the evidence stated in the plaintiff's first bill of exceptions, and which it is agreed shall be taken, and deemed as part of this exception, and the court having given the opinions stated in the plaintiff's first and second exceptions, the plaintiff, by his counsel, prayed the court to instruct the jury.

1. If the jury should believe, that on and prior to the 15th April, 1829, *Torrance*, the defendant, was one of the proprietors of the *Warren Factory*, and that *James A. Buchanan*, with the knowledge and consent of defendant, was the acting agent of the said factory, in the purchase of materials therefor, and in the management of its concerns generally, and gave the order of that date to *Oldfield*, for the purpose of procuring a supply of gum for said factory, and that in consequence of said order, and said *Oldfield* being the plaintiff's agent, said gum was furnished by the plaintiff, in the ordinary course of business, to *Buchanan*, who was continued as the agent of the *Warren Factory*, from September, 1828 to September, 1830, that then the said defendant is responsible for the price of said gum, if the same has not been in fact paid for; although the jury should believe that *Torrance* retired from said factory, and sold out his interest on the 16th April; and that *Buchanan*, as agent, gave his note for said gum, which was renewed from time to time, as stated in the evidence, if they should also believe that the plaintiff did not agree to discharge *Torrance*.

2. That there is no evidence of any agreement on the part of the plaintiff, to discharge *Torrance*.

3. That upon the whole evidence in this cause, the defendant was not a dormant partner of the *Warren Factory*.

4. That the defendant not being a dormant partner, was bound to give either express or public notice, to exempt himself from liability to the plaintiff, to the extent of ten thousand pounds of gum, if the jury shall believe that it was delivered, as stated in the plaintiff's evidence.

5. That if the jury should believe, that an answer to



*Buchanan's* letter of the 15th April, 1829, apprising him that the plaintiff had accepted his offer to purchase gum, was in fact delivered on the 20th April, 1829, that it was a sufficient answer, and complied with the terms of *Buchanan's* letter of the 15th April, and bound the defendant.

6. That upon the true construction of *Buchanan's* letter of the 15th April, 1829, *Oldfield*, or his principal, the plaintiff, was not confined to communicating the assent to *Buchanan's* proposition, by letter through the mail, but that the real design and true construction of the letter, was to secure to *Buchanan*, the knowledge of that assent, at as early a period as the return mail from *New York*, after the receipt of the letter, would bring it to *Baltimore*.

7. That if the jury should believe that *Oldfield* received *Buchanan's* letter of the 15th April, at *New York*, on the 17th, and that in fact *Oldfield's* principal, the plaintiff, answered that letter by mail of the 18th April, to *Oldfield*, *Trull & Co.* and mailed it in *New York* on that day, and that said letter reached *Baltimore* on the 20th April, which was in due course for a letter mailed at *New York* on the 18th, and the contents thereof were verbally communicated at the counting room of the *Warren Factory*, in *Baltimore*, by *Bernard's* agents, *Oldfield*, *Trull & Co.* on the 20th April, 1829, that it is sufficient compliance with *Buchanan's* proposal to purchase the gum, and constitutes a valid contract of the defendant with the plaintiff, to the extent of ten thousand pounds of gum, or to the extent of the gum actually delivered.

8. That if the jury should believe, that all the transactions given in evidence, relate in fact to the proposal contained in *Buchanan's* letter of the 15th April, 1829, to *Oldfield*, of *New York*, and that *Oldfield* was in fact the agent of *Bernard*, and that the gum was delivered to *Buchanan*, as agent for the defendant's previous partner, *E. S. Buchanan*; that then, under the circumstances of this case, the plaintiff is entitled to recover the value of the gum actually delivered, and not in fact paid for.

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9. That if the jury believe, that when the plaintiff shipped the gum at *New York*, he was induced to make the said shipment in consequence of the letter of the 15th April, 1829, by *James A. Buchanan*, and had no knowledge that on the 16th April, 1829, *James A. Buchanan's* agency for *Torrance* had ceased; and that neither *Torrance*, the other partner of *E. S. Buchanan*, nor *James A. Buchanan*, informed him or his agents, *Oldfield, Trull & Co.* of the change of the proprietors of the *Warren Factory*, then the plaintiff is entitled to recover the price of the gum actually delivered, or the quantity of 10,000 lbs.

10. If the jury believe, that in fact, no injury was done to *James A. Buchanan*, or the business he was then carrying on as the agent of the *Warren Factory*, by the omission, if any, on the part of the plaintiff to answer the letter of *James A. Buchanan*, of the 15th April, 1829, by return mail, and that in fact, on the 17th April, the day on which the letter of the 15th April was received, the gum was shipped at *New York*, and immediately transmitted and delivered to *Oldfield, Trull & Co.* and that on the 18th day of April, 1829, the plaintiff wrote a letter to *Oldfield, Trull & Co.* which was received in *Baltimore* by them, on the 20th April, and immediately communicated by *Oldfield, Trull & Co.* at the counting house of *James A. Buchanan*, and not dissented from, that then the plaintiff is entitled to recover for 10,000 lbs. of gum, or the quantity actually delivered.

The sixth instruction the court, with the assent of the defendant, gave to the jury, and refused the others. The plaintiff excepted, and the verdict and judgment being against him, he brought the record by appeal to this court.

The cause came on to be argued before *BUCHANAN*, Ch. J., and *MARTIN, STEPHEN, ARCHER* and *DORSEY, J.*

*Gill*, for the appellant, contended.

1. That the principal cannot countermand the authority of a *general agent* so suddenly, as to leave parties who

were in treaty with the agent before the countermand, to the hazard of consummating their dealings with the agent personally, when they supposed they were dealing with the agent in his representative character.

2. When a principal, who has had a *general* agent employed, wishes to terminate his responsibility for the agent's acts, he should countermand the authority, give express notice of revocation to those who had previously trusted his agent, and give public notice to affect those who had not dealt with the agent previously. In the latter case, his responsibility necessarily continues for a reasonable period, to be judged of according to the nature of the agent's previous employment, and the circumstances of each case.

3. That parties who treat with one who had been a general agent, as an agent, in good faith, ignorant of the revocation of his powers, and so soon after the revocation of his powers, that it could not be known, may hold the principal responsible, and that whether the name of the principal be previously known or not. 1 *Evans Poth.* 42, 43. *Sect.* 79, 80, 81. *Ib.* 267. *Sec.* 447. 2 *Livermore on Agency*, 308, 310, 193, 195. *Chitty on Cont.* 58. *Munn vs. Commission Company*, 15 *Johns. Rep.* 44, 54.

4. That the sale of the gum in this case, being to *Buchanan* as agent, and he really being an agent, the vendor has his remedy, as well against those persons for whom *Buchanan* was actually agent, as those who stand in point of law, in the relation of principal to him.

5. Upon the footing of partner, *Torrance* is responsible.

6. *Torrance* was not a dormant partner. *Mitchell vs. Dall*, 2 *Harr. and Gill*, 171. 3 *Esp. Cases*, 248. *Gow. on Part.* 6, 7, 31, 32.

7. A retiring partner is bound to give express notice to previous correspondents; public notice to other persons. Until one act or the other is done, his responsibility for the acts of his partner or his regular agent, in relation to contracts made in the name of the former firm, continues. *Watson on Part. ch.* 7, 280, 284. *Chitty on Con.* 79, 80.



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*Gow.* 322, 323. *Le Roy Bayard & Co. vs. Johnson*, 2 *Peters' S. C. R.* 186, 199. *Ketcham & Black vs. Clark*, 6 *Johns. Rep.* 144, 147.

8. The design of these principles is, to protect innocent men against fraud, and their application does not depend upon the creditor's knowledge or belief of a right to proceed against a principal of whose withdrawal he is ignorant, but upon the policy of the law, which places the restrictions contended for, upon the conduct of traders, as the surest means of promoting good faith and frank dealing, and of forcing those who take the chance of gain, to run the hazard of loss.

9. Applying these principles to the situation and established relations of *Torrance* to the *Warren Factory* and its agent, and to the time and circumstances under which the gum was sold and delivered, it is contended that the judgment of the county court should be reversed.

10. That neither the knowledge and belief of the other creditors of the *Warren Factory*, nor their belief of the general reputation of who were, or were not, the proprietors of that factory, is competent evidence against the plaintiff, and that the court erred in receiving such proof.

He further contended, that the original contract was not extinguished by the note given by the agent, nor by its renewal. *Gow.* 200, 201, 202, 331. *Glenn vs. Smith*, 2 *Gill and Johns.* 508. *Smith vs. Rogers*, 17 *Johns. Rep.* 340.

*Johnson* for the appellee.

1. There was no contract with the plaintiff, until after the 16th April, 1829, when *Torrance* ceased to be a partner, or to have any interest in the establishment. *Buchanan's* letter of the 15th April, containing the terms upon which he was disposed to purchase the property, required an answer by the *return mail*, and a compliance with that requisition, he contended, was indispensable to fix the responsibility of the defendant, if under other circumstances



after *Torrance* had retired from the concern, and instead of being sent direct to *Buchanan*, as should have been done, they were consigned to *Trull & Co.* the agents of the plaintiff. Besides, the quantity sent, exceeded the quantity ordered, by 892 lbs.; the acceptance therefore of the whole amount by *Buchanan*, constituted a new contract, which was in its nature, entire and indivisible, binding on the parties who were at the time interested in the establishment, but not on the defendant, who had previously parted with his interest. If the defendant is bound by the contract of the 20th, he would be equally bound, no matter how much more might have been sent, than the quantity ordered; and no matter how the terms of the proposition of the 15th might have been changed. If the proposition, with respect to quantity could be altered, and the responsibility of the defendant retained, it might be altered in every other particular, and still he would be liable.

2. The defendant was a dormant partner until 1829, and consequently, whether actual or constructive notice was given, he is not bound, *Ex parte Hodgkinson*, 19 Ves. 295. *Evans vs. Drummond*, 4 Esp. Rep. 89. *Newmarch vs. Clay, et al.* 14 East. 239. 3 Stark. Ev. 1080. *Carter vs. Whalley, et al.* 20 Serg. and Low, 333. If prior to the 16th April, 1829, *Torrance* was not known as a partner in the factory, either to the plaintiff or his agent, then upon the authority of the case in 20 Serg. and Low. 333, he was not entitled to notice, either actual or constructive. The liability of a dormant partner depends upon the *fact* of his being a partner, when the contract is made, and not upon any credit given him, because, as he is not *known* to be a partner, the credit cannot have been given to him. *Gow*. 333. *Mitchell vs. Dall*, 2 Harr. and Gill, 171.

3. The defendant was not bound by the acts of *Buchanan*, considered as his agent. The agency had in fact ceased, and as he was not known to be *Buchanan's* principal, the plaintiff could not have been deceived. After parting with

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his interest, *Buchanan* was not his agent, and could not bind him, *Leroy Bayard & Co. vs. Johnson*, 2 *Peters' S. C. R.* 179. 2 *Livermore*, 310. 1 *Evans' Poth.* 268, 269. *Watson on Part.* 280. The evidence offered in the first exception to prove that defendant was not known to be a partner, was competent. The plaintiff might have adduced such evidence to show that he was so known, and it would seem to follow, that the reverse might be proved by the defendant. *Carter vs. Whalley, et al.* 20 *Serg. and Low.* 333.

ARCHER, J. delivered the opinion of the court.

The offer to purchase the *Gum Senegal*, for the value of which this suit was brought, was made by *James A. Buchanan*, agent for the *Warren Factory*, on the 15th April, 1829, at a period of time when *George Torrance*, the defendant, was a partner of *E. S. Buchanan*, and joint owner with her of the *Warren Factory*. The defendant and *E. S. Buchanan* were unknown to the public as the proprietors of the *Warren Factory*, but its business was transacted by *J. A. Buchanan*, as the agent. On the 16th April, 1829, the defendant contracted to sell to *E. S. Buchanan* his interest in the establishment, and ceased from that day to have any interest in the conduct and management of the concern, and it was in fact at no time afterwards conducted on his account. On the 13th April, 1829, *G. S. Oldfield*, who was the agent of the plaintiff, residing in *New York*, offered to the agent of the *Warren Factory* to sell the *Gum Senegal* in question, at a price, which by letter of the 15th April, the agent, *James A. Buchanan* refused to accept, and he in his turn made the offer above adverted to, by which he proposed to take 10,000 lbs. at 18 cts. 4 months credit, and in the offer, requested it to be forwarded if accepted, and desired to be notified of the acceptance "by the return mail, that he might regulate his foreign orders." This letter was received by *G. S. Oldfield* in *New York*, and handed over by him to his principal, the plaintiff, who immediately shipped 10,892 lbs. of gum to *Oldfield, Trull*

& Co. on the 18th April, and on the same day forwarded to them a letter apprising them of the sale to *Buchanan*, and requesting them to deliver it, and take his note for the same at 4 months. This letter was duly received by *Oldfield, Trull & Co.* on the 20th April, 1829, and on the same day was communicated to *James A. Buchanan*, and on the arrival of the *Gum Senegal* in *Baltimore*, it was delivered by *Oldfield, Trull & Co.* to *James A. Buchanan*, and by him accepted, and his note taken according to instructions, for the amount of the purchase money. This note, which had been discounted at bank, was not paid at maturity, but was taken up with funds derived from the firm of *Oldfield, Bernard & Co.* of *New York*, for *Bernard*, who was then in *Europe*; and a new note was given by *James A. Buchanan* as agent, for the amount, which like the former was unpaid at maturity, and a third note was likewise given, which also was unpaid, and this suit was instituted by the plaintiff to recover the value of the gum. *Torrance* on the 11th May, 1829, had given notice of his retirement from the concern, in the *Gazette*, a paper printed in *Baltimore*, and the plaintiff, who at the commencement of these transactions had resided in *New York*, was absent on the continent of *Europe*, when the first note was taken up, and when the two other notes were given. It also appeared in evidence that the agency of *Buchanan* for the factory, was well known to *G. S. Oldfield*, the agent of the plaintiff in *New York*, through whom this transaction was negotiated.

If the terms of *Buchanan's* letter of the 15th April, were substantially complied with by the plaintiff's acceptance, we conceive that the defendant would be liable to the extent of ten thousand pounds of gum, notwithstanding his withdrawal from the concerns of the factory, on the 16th April, whether he be considered solely in the light of a principal in the transaction, or as a joint owner, or partner with *E. S. Buchanan* in the factory.

In the former case, the agency of *James A. Buchanan*, for some principals, was well known to the agent of the



plaintiff, and that in this transaction, he was not trading on his own account. He was styled, "the agent for the *Warren Factory*," and dealt as such, and credit was given not to the agent, but to the owners and proprietors of that establishment at that time. It is true, the owners were personally unknown, but credit was imparted to them from the character of the establishment, of which they were proprietors, and when discovered, their responsibility for the contracts of their accredited agent was unquestionable. Principals, when discovered, are ordinarily liable for the contracts of their agents.

If therefore, this contract had been accepted by the plaintiff, at any time anterior to the defendant's withdrawal from the concerns of the establishment, or at any time before the agency of *J. A. Buchanan* had been determined, there could have been no doubt entertained, as to the responsibility of the defendant. But as *Torrance* ceased to have any concern in the factory the day after the offer, and before the contract was consummated, it is supposed, that he could not be made liable. Treating the letter of the plaintiff as an acceptance, the contract with him was certainly not consummated until the 18th April, 1829, for it is the offer on the one side, and acceptance on the other, which constituted the contract. But we apprehend, that under the circumstances which this case presents, it would not be essential to inquire, what was the date of the contract to determine the liabilities of the parties. The material inquiry is, the date of the offer. A principal authorising an agent to make an offer, cannot withdraw to the prejudice of him to whom the offer is made. On the supposition that an acceptance of the offer has been made, a contrary doctrine would work the grossest injustice to the plaintiff. He accepts the offer of one, who is known to be the agent, and ships his goods accordingly, before he could by any possibility know that the principal had put an end to the agency, or withdrawn from the management and concerns of the factory. The contract by which the defendant



had agreed to dispose of his interest, was a secret transaction between him and *E. S. Buchanan*, not known, as far as we are left to infer from the evidence, in *Baltimore*, the neighborhood of the factory, much less in *New York*, the residence of the plaintiff. The liability after the offer is made, must continue, if it be accepted, for it is the principal's own offer, made it is true through his agent, but on that account, not the less his offer.

But to constitute it the contract of the principal, and make the offer obligatory upon the defendant, it must have been accepted, according to the terms of the offer. *James A. Buchanan* could have entered into no new negotiations, or stipulation, after the withdrawal of his principal, which could bind the principal; nor could he possess any power after such withdrawal to dispense with any conditions of the offer. Any new stipulation, or dispensation with offered stipulations, would make the agreement not the acceptance of the one offered, but a new agreement; which being made after the defendant's withdrawal, would constitute a new contract, not binding on the defendant, but binding on the principal, of whom *Buchanan* had then become the agent, and it is therefore supposed that such has been the case here, and we are called upon to say, that the contract in question is, in point of law, a new contract not obligatory upon the defendant.

The communications passing between the parties, which together constitute the contract, ought to receive a reasonable interpretation, and should be examined in that spirit of liberality, with which mercantile contracts ought always to be viewed by courts of justice.

With this principle in view, we will proceed to examine the facts relied upon, to show that there was not a consummation of the offer made, but that a new contract was formed.

We shall for the present, waive the inquiry, as to the period when the acceptance was made, and when notified, and the legal consequences growing out of these acts. These we shall examine in the close of this opinion.

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It is supposed, that as the gum was not shipped to *J. A. Buchanan* at his risk, but instead thereof, was shipped and consigned to *Oldfield, Trull & Co.* and at the risk of the plaintiff, and that as 10,892 lbs. of gum were forwarded, instead of the quantity for which the offer was made, that these circumstances created a variation in the contract, or rather caused the receipt of the gum by *J. A. Buchanan*, from *Oldfield, Trull & Co.* to form a new contract, and that the existence of such new contract is conclusively evidenced by the acceptance by *Buchanan*, of 10,892 lbs. and giving his note for the entire quantity. In these views, however, we cannot concur. The great object of the agent of the factory, was to procure a given quantity of gum, and if this were attained, it could make no possible difference to him, that instead of being forwarded direct to him, it was consigned to another, with directions to deliver it to him. In either case, according to the intention of the parties, the gum was equally forwarded to him. Nor could the fact, that the gum was transmitted at the risk of the seller, instead of being at the risk of the purchaser, as had been originally proposed, give rise to the idea of a new contract. The plaintiff by shipping at his own risk, merely waived a privilege which he had insisted upon for his own benefit, and accepted the offer stripped of that which would have been a burthen to the purchaser. He certainly did not, nor could have meant thereby, to have given the purchaser the opportunity and privilege, in consequence of waiving what was a benefit to himself, of refusing the bargain, and repudiating the contract on the arrival of the gum. And there is just as little reason in saying, that because an additional quantity of gum was transmitted and accepted, that there was therefore a new contract entered into when the gum was delivered to *J. A. Buchanan*. For any quantity taken by *Buchanan* over and above the 10,000 lbs. there was a new contract, but the letter to *Oldfield, Trull & Co.* declares the quantity sold to be 10,000 lbs., and *Buchanan* was not bound to have taken more, and the 10,000 lbs. is

transmitted with the privilege to *Buchanan* of purchasing at the same price the additional quantity which was sent; and whether the additional quantity was, or was not taken by *Buchanan*, the contract was complete and obligatory, if in every other respect the offer was complied with, and the principal was bound, and for any surplus which was received and purchased, the then owners of the factory were answerable, and not the defendant. Nor do we conceive, that the delivery to *Oldfield, Trull & Co.* of the promissory note, for one entire sum, for the purchase money, and their acceptance thereof, could in any manner change the character of the original contract, and make other persons his debtors than those with whom he had contracted. His contract was made for the gum with the former, not the then proprietors, and to make the note operate the effect of shifting the contract from the defendant to the then proprietors of the factory, it ought to be shown, that the plaintiff knew of the ownership of the factory having been changed, which is not only not shown, but it would appear that this fact was unknown even in the neighborhood of the establishment.

If indeed, the plaintiff had at any time, agreed to discharge *Torrance* by accepting the responsibility of *James A. Buchanan*, or the proprietors of the factory at the time the second and third notes were renewed, the defendant could not in this case be answerable; but that is exclusively a question for the jury, and whether he did then agree or not, cannot have any bearing on the question, with whom the original contract was made. The acceptance of the first note, certainly furnishes no evidence of such consent to discharge the defendant, because as has just been stated, the plaintiff did not, nor could know, that any change in the ownership had taken place.

If *Torrance* and *E. S. Buchanan* be considered in the light of joint owners or partners, either dormant or otherwise, there exists the same responsibility. They were principals, and although unknown, the credit was given to



them. It was not given to the agent. His character of agent was known. Nor was it given to the establishment, but to its owners, in virtue of their establishment, who when discovered, were answerable as has been before stated. The only difficulty which could exist, as to their responsibility as partners, must be placed on the ground, that no contract was entered into during the existence of the partnership. But we have seen that the vendor had a right to look to the principal, if the agent made an offer, although the agency should have been revoked, or the principal withdrew from the concern before the vendor accepted, and before he could possibly know of the course to be pursued by the principal, and if this be the correct doctrine, the retiring partner would be bound in the same manner, as if he had continued in the firm until the consummation of the contract.

From the preceding views it follows, that the county court were in error in granting all, or any of the defendant's prayers.

Before expressing an opinion upon the judgment of the court below, in their refusal to grant the prayers of the plaintiff, it will be necessary to examine one branch of the offer made by *J. A. Buchanan* to the plaintiff, which has not heretofore been adverted to, and upon the solution of which, the event of this cause must mainly depend. We advert to that part of the offer, which called upon the plaintiff, if he accepted it, *to apprise him of the fact by the return mail, that he might regulate his foreign orders.* The construction of this clause, in a mercantile contract of this description can, we think, hardly admit of a doubt. Its importance to the defendant is manifested by the fact, that it constitutes a leading feature in the offer; and by the reason which is assigned for the request, and is just as obligatory as if it had constituted an express condition upon which the offer was made. That the defendant sustained no injury, if an answer had not been returned as requested does not meet the question.



The defendant would have a right to say *non in hæc foedera veni*; my offer is not to be considered as a binding offer, unless I get the notification of your acceptance by return mail, or by some other mode of conveyance equally as speedy. This we believe to be the true construction of the offer, and whether or not, this part of the offer was complied with on the part of the plaintiff, is a question exclusively for the consideration of the jury; and if the offer in this respect was not complied with, *Torrance* having withdrawn before the 18th of April, the day of the acceptance of the offer, any dispensation with this important feature of the original proposition, would make what was subsequently done, a new contract, entered into after the agency had terminated, and of course, *Torrance* would not in such event be answerable.

Applying the doctrines maintained in this opinion, to the various prayers offered by the plaintiff, it will follow, that the court were right in rejecting all the prayers offered by him.

The evidence of various merchants and traders, offered by the defendant, to prove that it was not generally known in *Baltimore*, or elsewhere, that the defendant was at any time interested in the factory, was, we think, properly admitted. For if it had been generally known in *Baltimore*, that *Torrance* was interested in the concern, a knowledge of that fact might have been presumed in the plaintiff; and if the plaintiff had knowledge of this interest, and no knowledge of the withdrawal, the defendant's liability would continue, until he gave notice of his withdrawal. 1 *Barn. & Adolp.* 11. 20 *Serg. & Lowb.* 333.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

DORSEY, J. dissented.

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Slemaker vs. Marriott.—1833.

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JACOB H. SLEMAKER vs. BUSHROD W. MARRIOTT.  
*December, 1833.*

The sheriff is responsible for the escape of a party arrested in a civil action, or committed for want of bail, though the public jail in which such party is confined is out of repair;—he is bound by public policy for the safe keeping of those whom the law entrusts to his care.

The act of 1818, ch. 208, has so far recognized the practice of committing slaves to jail, by justices of the peace, at the request of their owners, for real or supposed offences against them, to be there supported at the expense of such owners, that such a commitment, not made at the instance of a party engaged in the traffic of buying and selling slaves, is to be regarded as made in due course of law, for which the sheriff is responsible accordingly.

The sheriff who receives the public jail from his predecessor without a deed of assignment, is responsible from that period, for the safe keeping of the prisoners there, as if they had been originally committed to his custody.

APPEAL from *Anne Arundel County Court.*

This was an action on the *case*, instituted by the appellant on the 18th April, 1831, against the appellee, the sheriff of *Anne Arundel* county, to recover damages for the escape of a negro man, the slave of the plaintiff, who had been committed to the defendant's custody for safe keeping. Issue was joined upon the plea of not guilty. At the trial the plaintiff proved, that on the 26th of October, 1830, he was the owner of the negro slave, in the declaration mentioned; that he was worth \$375; that he ran away, was apprehended, and confined in *Harford* county jail. That by the authority of the plaintiff, the witness went to *Harford* and received the slave, brought him to *Annapolis*, and carried him before a justice of the peace for *Anne Arundel* county, on the 26th of October 1830, who then and there committed him to the custody of the sheriff of said county. That the witness delivered him on the same day with the following commitment to the jailer, in the jail.

“The sheriff of *Anne Arundel* county will receive into his custody, the body of negro *Bill Philips*, the property

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of *Jacob H. Slemaker*, and him safe keep, until released by his said master. Given under my hand and seal, this 26th October, 1830. *James Hunter.* (seal.)”

He further proved, that a certain *Richard Iglehart* was then in possession of said jail, by virtue of his office as sheriff, which expired on the first Monday of the said month of October. That the defendant was duly elected, and commissioned as sheriff, and bonded as such on the 27th of the same month, which bond was approved on the 2nd, and recorded on the 8th of the then following November. That on some day between the 4th and 9th of the said month of November, the witness, who was duly authorised for that purpose, by the late sheriff *Richard Iglehart*, attended in the sheriff's office, and offered to surrender the office, and jail to the defendant, who upon being informed that a formal assignment was not necessary, or usual, consented to receive the custody of the said jail, promised to continue the late jailer, as his jailer, and went towards the jail for that purpose. That the negro slave in question, was then confined in the said jail, and escaped a few days afterwards.

The defendant then offered to prove by a witness who was present at the conversation between the agent of the late sheriff and the defendant, that the defendant declined receiving the jail without a written transfer of the prisoners. The defendant then asked the witness what was the condition of the jail at the time of the confinement, and escape of the said negro, but the plaintiff objected to the question, upon the ground that the jail's being out of repair did not exonerate the defendant from his responsibility to the plaintiff in this action; but the court (*DORSEY*, Ch. J., and *KILGOUR*, and *WILKINSON*, A. J.) overruled the objection, and directed the witness to answer the question, being of opinion, that the commitment in this case, was not of such a character as to bind the sheriff for all possible escapes, save those arising from the act of *God* or the king's enemies.

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The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and ARCHER, J.

*Brewer* for the appellant contended,

1. A sheriff is answerable for the escape of a prisoner legally committed to his custody, in every event, unless it be occasioned by the act of *God*, or of the enemies of the State, and is not excused, though the escape is in consequence of the jail being out of repair. *Jones Bail.* 121. (note 38.) *White vs. Wagner*, 4 *H. and J.* 391.

2. The negro for whose escape this suit was instituted, was legally in the custody of the sheriff, as sheriff by virtue of the commitment set forth in the bill of exceptions. 2 *Bac. Abr.* 508. *Act* 1715, *ch.* 44; 1792, *ch.* 72; 1818, *ch.* 208. *Somervell vs. Hunt*, 3 *Harr. and McHen.* 113.

3. The assignment as proven in the bill of exceptions, was sufficient to vest the custody of all the prisoners in the defendant, if any assignment was necessary, which however is denied. 6 *Bac. Abr.* 161.

*Alexander* for the appellee.

1. If the opinion of the county court is right, then the judgment must be affirmed, although this court should not concur in the reason given for it. *Sothoron vs. Weems*, 3 *Gill and Johns.* 441. The evidence offered was admissible in bar of the action, as its tendency was to show, that the defendant had been guilty of no neglect, which is the gist of the complaint. 2 *Stark. Ev.* 360. 1 *Wheat. Selw.* 455.

2. The act of 1818, gives the master the privilege of committing his slaves to jail, to be there supported at his expense, but it does not require the sheriff as such, to receive and keep them. If the sheriff thinks proper to receive, the law protects him from any penalty for so doing; but there is nothing in it, which requires it of him as a



matter of official duty, or allows him any compensation for so doing.

3. If however the slave was legally in the custody of the sheriff, still, he is only liable in the present action to such damages as the jury may consider reasonable under all the circumstances. 2 *Johns Rep.* 453. *Bonafous vs. Walker*, 2 *Term. Rep.* 126. 1 *Saund.* 37. And it follows therefore, that although evidence in regard to the condition of the jail might not be admissible in bar of the action, it would be in mitigation of damages. 2 *Stark. Ev.* 877.

BUCHANAN, Ch. J., delivered the opinion of the court.

The appellant being the owner of a negro slave who had absconded from his service, on his being brought back, caused him to be committed by a justice of the peace to the jail of *Anne Arundel* county, who was received by the then sheriff into his custody, and confined in jail; and on the expiration of his term of service as sheriff, the defendant who succeeded him, on entering upon the duties of his office, accepted and took possession of the jail, together with the negro slave then confined in it, but who in a few days afterwards made his escape, and became wholly lost to the appellant; and this suit was brought against the defendant as sheriff, to recover damages for the escape.

At the trial the plaintiff gave evidence of the value only of the negro, as the measure of the damages sought to be recovered. And the defendant offered to give evidence of the condition of the jail at the time of the confinement and escape of the negro; which was objected to on the part of the appellant, on the ground that the jail being out of repair did not exonerate the defendant from his responsibility in damages on account of the escape; but the court overruled the objection, and suffered the evidence so offered to go to the jury. To which an exception was taken, and the question presented is, whether a sheriff is liable in damages for an escape, in any such case of commitment to jail

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by a justice of peace of a negro slave at the instance of his owner, as in the ordinary case of an escape? The evidence was not offered in mitigation of damages, but in bar of the action, and objected to on that ground, and admitted for that purpose. It was the only purpose for which it could have been used. The defendant was liable or not for the escape. If answerable at all, and not exempted from responsibility by the jail being out of repair, (if such was the fact,) his liability was co-extensive with the loss, the injury sustained by reason of the escape, and could not be affected by any condition of the jail, (with which the appellant had nothing to do,) that did not exonerate the defendant. It is not like the case of an action for damages, in which the conduct of the plaintiff, the provocation received by the defendant, &c. may be given in mitigation, as in an action for a libel, or of assault and battery. And whether the evidence offered, and objected to, was admissible or not, in bar of the action, depends upon the character, and extent of the duties, and responsibility of sheriff, in relation to commitments to their custody, and safe keeping, by justices of the peace of negro slaves, at the instance of their owners. If the owner of a negro slave has the right to have such negro slave committed to jail, the sheriff, as such, is bound to receive and safe keep him; and is equally liable for an escape, as in the case of a man whom he has arrested in a civil action, or who may be committed for want of bail. And it is not denied, that in such a case the sheriff would be liable for an escape, notwithstanding the public jail should happen to be out of repair. That is his own look out; he takes upon himself the office with its responsibilities, and is bound for the safe keeping of those whom the law intrusts to his custody. Public policy requires it, and in an action against him for an escape, it is not a sufficient answer to say that the jail was out of order. The only inquiry therefore is, whether the appellant had a right to have the negro man in question committed to the jail of *Anne Arundel* county; no objection being raised to

the sufficiency of the warrant of commitment, in form, or substance.

It has been the constant practice (with what moral propriety, it is not for us to say,) for owners of slaves in this State, to have them committed to the jails of the respective counties, for real or supposed offences committed against their owners. But a great abuse of the public jails having grown up, in making them the receptacles of slaves for persons engaged in the traffic of buying and selling them, the act of 1818, *ch.* 208, was passed to correct that abuse. By the first section of which it is declared to be unlawful for the sheriff of any county, to receive into the public jail any negro slave unless committed in due course of law. The second section imposes a fine of \$500, upon any sheriff who shall receive into the public jail any slave unless he shall be so committed. And by the third section it is enacted, "that nothing in this act contained, shall be construed to prohibit or prevent the owner of a slave, who is a person not engaged in the traffic of buying and selling slaves, from having any slave committed to jail, and supported at his expense." Thus, by prohibiting sheriffs from receiving into the public jails, negro slaves belonging to persons engaged in the traffic of buying and selling slaves, unless committed in due course of law; and treating commitments of negro slaves for safe keeping, at the instance of such persons as not made in due course of law; and by declaring, that nothing in that act shall be construed to prohibit or prevent the owner of a slave, who is not a person engaged in the traffic of buying and selling slaves, "from having any slave committed to jail," by irresistible implication, (construing all the sections together,) legalizing such commitments, and giving to them the character and effect of, and recognizing them as *commitments in due course of law*. The words "having any slave committed to jail," meaning (in the sense in which they are used in the act,) *committed by a proper officer of the law*. What other construction can be given to that act? No negro slaves are to be received



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Armstrong vs. Robinson — 1833.

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into the public jails, *unless committed in due course of law*, but slaves committed at the instance of owners not being persons engaged in the traffic of buying and selling slaves, are to be received into the public jails. Such commitments therefore, are authorized by that act, and are *commitments in due course of law*. It is a right recognized, and extended by the act to the designated owners of slaves, to have them committed to jail by the proper officer, and the sheriffs are bound to receive such slaves so committed, to be supported under the provisions of the last section of the act, at the costs of their owners.

In this case, the defendant having entered upon the duties of his office, accepted, and received the jail from his predecessor, together with the negro in question then confined in it, he took him with the jail, and is in no better condition, than if he had been originally committed to his custody; and is amenable to the appellant in damages to the amount of the loss sustained, in consequence of the escape of the negro.

In this view of the subject, we think the court below erred in permitting the evidence objected to, to go to the jury.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ROBERT ARMSTRONG vs. ROBERT & THOMAS ROBINSON.  
*December, 1833.*

Where a bond was conditioned to perform an award to be made by arbitrators, and the condition (which recited the submission) was silent as to the time at which the award was to be rendered, the circumstance that the penal part of the bond acknowledged the sum "by us (the obligors) to be paid to the said R three months from the date hereof," cannot avail, to engraft a limitation upon the power of the arbitrators, and make an award rendered after the expiration of three months void.



Where a bond was payable to R & Co. a declaration stating, that A acknowledged himself to be held and firmly bound unto T R & R R, by the name and style of R & Co. is sufficient, and this is no variance.

In actions founded upon contract, whether by parol or deed, if the demand or cause of action be joint, all the parties, if alive, must join in bringing the action, which should properly be in their names, and not in the name of the company or firm, where it is a company or firm, that has the cause of action.

In actions upon the contract, where all the parties do not join as plaintiffs, the defendant may avail himself of the non-joinder upon proof at the trial, or he may plead such matter in abatement, or if it appears on the record by the pleadings, he may take advantage of it by demurrer.

In a suit on a bond signed A & Co. the writ and declaration were against A only; the court will not upon general demurrer assume, that there was any other living person jointly bound with A at the time the suit was brought, nor that A was not A & Co.

In declaring on a bond it is not necessary to set it out in *hæc verba*, but it is sufficient if it is stated according to its true legal effect and operation.

One partner cannot bind another by his bond sealed in the name of the firm, to perform an award, though the bond is binding upon the party who seals it, and may be declared upon accordingly.

An award must pursue the submission, or it is bad.

Where the condition of a bond was, that A & Co. should comply with the award of abitrators, and the award was that A (who in fact signed the bond as A & Co.) should pay, or cause to be paid by A & Co. a sum of money in full settlement of the matters submitted, *this was held* in effect, an award that A & Co. should pay, or considering the bond as A's sole obligation, and as a stipulation that he should pay, then the award was within the condition, and in either case sufficient.

### APPEAL from *Baltimore County Court*.

This was an action of *Debt*, instituted by the appellees against the appellant, on the 22d of March, 1828, on a bond signed and sealed by "*Robert Armstrong & Co.*" in favor of "*Robert Robinson & Co.*" bearing date on the 18th May, 1827, in the penalty of \$5000, to be paid in three months from the date thereof, conditioned as follows. "The condition of this obligation is such, that whereas several difficulties exist in the settlement of monied and commercial concerns, between the above named *Robert Armstrong & Co.* and the said *Robert Robinson & Co.*, and they the said parties have mutually agreed, that *John Keys* and *Thomas*

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*Kelso* shall adjust and settle the above mentioned accounts, with the privilege of calling in a third person if necessary, and if the above bounden *Robert Armstrong & Co.* comply with the award of the above named arbitrators, the above obligation to be void, &c.”

The declaration after reciting that the appellant, *Robert Armstrong*, by the above bond, acknowledged himself to be bound to the appellees, *Robert Robinson & Thomas Robinson*, in the sum of \$5000, by the name, and style of *Robert Robinson & Co.* proceeded to aver, that the arbitrators duly made, and delivered their award on the 22d day of March, 1828, and did then and there award, order, and direct, that the said *Robert Armstrong* should pay, or cause to be paid by the said *Robert Armstrong & Co.* to the said *Robert Robinson & Co.* the sum of \$4500, in full settlement of all the claims, accounts, and demands whatsoever, between the said *Robert Armstrong & Co.* and the said *Robert Robinson & Co.* up to the 18th of May, 1827, and arising out of the commercial and monied transactions between said companies; with a clause providing for mutual releases, &c.” The breach assigned was, that *Robert Armstrong* had not himself paid, or caused *Robert Armstrong & Co.* to pay the amount of the award.

After *Oyer*, the defendant pleaded that the arbitrators did not within three months from the date of the said writing obligatory make an award, &c.

The plaintiffs demurred generally to this plea, and the defendant joined in the demurrer.

The county court ruled the demurrer good, and gave judgment for the plaintiff; upon which the record was, upon the appeal of the defendant, brought to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and DORSEY, J.

*Gill* and *Campbell* for the appellants, contended.

1. That upon the true construction of the bond, it was the intent of the parties, that the arbitrators should make

an award within *three months* from its date. The object of arbitrations is to accelerate the settlement of controversies; and the court will look into the bond for expressions indicative of an intention to limit the arbitrators, in reference to the time of making their award. The only words in this bond from which such intention can be deduced, are the words, "to be paid in three months," and as these are introduced in the obligatory part of the instrument, and of course could not have been intended to favor the obligor by giving him a credit, they must have been designed to limit a period within which the award was to be made.

2. The award is not within the submission. The bond is signed by *Robert Armstrong & Co.*, and the award is to be performed by *Robert Armstrong*. *Robert Armstrong*, and *Robert Armstrong & Co.* are not the same persons; nor is there any averment in the pleadings that they are the same. The word "company," imports that some one was associated with *Robert Armstrong*. *Mitchell vs. Dall*, 2 *Harr. and Gill*, 170.

3. The bond given on *oyer* does not conform to the bond declared upon. The declaration is upon the individual bond of *Robert Armstrong*, whilst the bond produced on *oyer* is by *Robert Armstrong & Co.* There is no averment that *Robert Armstrong* is a member of the firm of *Robert Armstrong & Co.* That he signed it for the firm, and therefore it will not do to say, that it is his individual bond, though signed in the partnership name. *Sheehy vs. Mandeville*, 7 *Cranch*, 217. *Ferguson vs. Harwood*, *Ib.* 413. *Bonner vs. Wilkinson*, 5 *Barn. and Ald.* 682. *Henry vs. Brown*, 19 *Johns. Rep.* 50. *Gould vs. Barnes*, 3 *Taunt.* 503. *Cooke vs. Graham*, 3 *Cranch*, 229. *Bonner vs. Wilkinson*, 7 *Serg. and Low.* 231. *McNitt vs. Clarke*, 7 *Johns. Rep.* 467.

4. There is a variance also in this, that the declaration avers that the defendant bound himself unto *Thomas Robinson*, and *Robert Robinson*, by the name and style of *Robert Robinson & Co.*, when in fact the obligation is to



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*Robert Robinson & Co.* If the fact be, that *Robert* and *Thomas Robinson*, are *Robert Robinson & Co.* it should have been so averred, that an issue might have been taken upon it; instead of which the declaration is so framed, as to make it a question of legal construction for the court, and not of fact for the jury.

5. These objections to the plaintiff's right to recover, are open to the defendant upon the present state of the pleadings. *Cooke vs. Graham*, 3 *Cranch*, 229. *Wardell vs. Pinney*, 1 *Wendell*, 218. *Manhattan Co. vs. Ledyard*, 1 *Caine's Rep.* 192. *Ehle vs. Purdy*, 6 *Wendell*, 630. *Gould vs. Barnes*, 3 *Taunt.* 503. 1 *Chitty Pl.* 336, (*Ed.* 1833.) *Moore vs. Fenwick*, *Gilmor's Rep.* 217.

6. The breach is not properly assigned. It is for the failure of *Robert Armstrong* to perform the award, when it should have been that of *Robert Armstrong & Co.* 1 *Chitty Pl.* 615, (*Ed.* 1833.) 2 *Harr. Ent.* 562. 2 *Chitty Pl.* 619, (*Ed.* 1812.) 1 *Saund.* 317, (*note* 1.) 1 *Saund. Rep.* 103, (*note* 1.)

*Johnson* and *McMahon*, for the appellees.

1. The first question is, what is the true construction of the bond sued on? Though the obligatory part of an arbitration bond is *in præsenti*, its legal obligation is to perform the award when it shall be made. The obligatory part therefore, is not to be referred to for the contract of the parties; but the condition which contains the submission. The stipulation therefore, that the award should be paid within three months from the date of the bond, cannot refer to the time within which the award was to be made; as if so, the defendant might be deprived of the benefit of it, because as the submission does not say when the award should be made, it might have been made the next day, and then the bond would have been immediately suable. This stipulation was for the benefit of the defendant, and was designed to give him three months to pay the bond in. Where no



time is limited for making the award, the arbitrators have what time they please. *Caldwell on Awards*, 46.

2. It is alleged, that there is a variance between the bond produced on *oyer*, and the bond declared on. That the declaration is on the individual bond of *Robert Armstrong*, and the bond offered is the bond of *Armstrong & Co.* The objection is, that there are other defendants who ought to have been joined. But this, if so, should have been pleaded in abatement, though the contract itself shows that there are absent parties. This rule is universal, except where the plaintiff's declaration shows that there are other parties *then liable to be sued*. If the declaration only shows that there are other parties, and not that they are then liable to be sued, the objection must be taken by plea in abatement. *Brown vs. Warram*, 3 *Harr. and Johns*. 572. 1 *Saund.* 288.

The demurrer admits all the facts contained in the plea, which are well pleaded. That is, it admits every fact which the party, whose plea is demurred to, might give in evidence in support of it, if it was denied. By the demurrer in this case, the defendant has no defence which would not be open to him upon the plea of *non est factum*; and the question is, whether upon that plea, the variances complained of would be fatal to the plaintiff's right to recover. Now can there be a doubt, that upon such a plea, the plaintiffs might prove that the defendant alone signed the bond, even although the words "& Co." meant another party? It would still have been the bond of the party who signed it, and the plea of "*non est factum*" would not avail him. A partner without authority, cannot bind his co-partner by deed, though it binds himself. *Kidd*, 42. A plaintiff is never required to insert more in his declaration than gives him a good *prima facie* case. Defensive matters must come from the defendant. If therefore, other persons signed the bond, it should be alleged by the defendant in his plea. The court will not intend it. 1 *Saund.* 288. If the alleged variance is fatal on demurrer,

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then you deprive the plaintiff of the privilege of proving that no one signed the bond but the defendant, though if that was in fact the case, he alone would be responsible.

The presumption that the words "& Co." include other persons, is not a legal presumption, and as such conclusive. It is at best, but a presumption of fact which may be rebutted. The court cannot intend as a legal presumption, that there was another person beside *Robert Armstrong* who signed the bond. 1 *Peters' S. C. R.* 222. Even if there was another person, he would not be bound, unless he authorized the party to sign for him, and the defendant must show the authority by his plea. *Cutter vs. Whittemore*, 10 *Mass. Rep.* 444. The variance must be in a material part of the bond. If the legal effect is stated, it is sufficient. *Fergusson vs. Harwood*, 7 *Cranch*, 408, 413, 414. The court always views awards with great favor. *Archer vs. Williamson*, 2 *Harr. and Gill*, 62. *Cromwell vs. Owings*, 6 *Harr. and Johns*. 10.

BUCHANAN, Ch. J., delivered the opinion of the court.

The first question raised upon the pleadings in this cause is, whether according to the proper construction of the arbitration bond on which the suit is brought, the award should not have been made within three months from the date of the bond.

No time is limited in the condition of the bond for making the award, but the argument on the part of the appellant, in support of the affirmative of the proposition, is drawn from the words, "by us to be paid to the said *Robert Robinson & Co.* three months from the date hereof," to be found in the obligatory part of it. At first blush there would seem to be something in it, and as if the obligation to pay, three months from the date of the bond, looked to the award being made within that time; the intention being, that the bond should not become absolute before an award should be made. But if the words, "by us to be paid three months from the date hereof," had been

altogether omitted, and no time of payment mentioned, so that as in the case of an ordinary bond, without any limitation of time in the condition for the payment of the money, looking to the language of the obligatory part of it only, it would have been payable immediately, it would scarcely be said that the award was required to be made *instanter*,—complicated commercial transactions constituting the subject of the submission; and that if not so made, the bond would have become inoperative, and that no suit could have been sustained upon it, for the non-compliance with an award made three days afterwards. Such a construction could never be given to such a bond, which would be to render it a nullity from the moment of its execution. But being an undertaking for the performance of an award to be subsequently made, though payable on its face immediately, it only becomes absolute on the failure, or refusal of the obligor to perform the award when made, which must be done within the time limited in the condition, if there be such a limitation of time; and if not, then at any indefinite time. The limitation of the time for making the award (where there is any,) being always in the condition of the bond, that being one of the offices of the condition. And it is wholly immaterial whether there be any time of payment specified in the obligatory part of the bond or not; since it is not on the failure of the obligor, to pay the amount of the sum mentioned in the bond that his liability attaches, but on his failure only to perform the award. His obligation being not to pay the sum mentioned in the bond, at the expiration of the time specified, but to perform the condition on pain of forfeiting the penalty. The object, therefore, of introducing the words, “by us to be paid three months from the date hereof,” must be understood to have been to protect the obligor against an action upon the bond, before the expiration of that time, in the event of an award being made within the three months, which may have been thought probable by the parties. And after the expiration



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of the three months, the bond stood as if no such words had been used; and as if they had been originally omitted, awaiting the action of the arbitrators, and the violation of the condition by the obligor, to give to the obligees a right of action; which could only accrue on such violation, in neglecting or refusing to perform the award when made, until when, it gave to the obligees no action, or demand against the obligor. And no time being limited in the condition for the making the award, the arbitrators named had their own time for doing it, without being restricted to three months as has been supposed. It cannot be denied, that though the time of payment mentioned in the bond, is three months after the date, if the time for making the award had been limited in the condition to six months, (which might well have been,) and the award had been made at any time after three months, but within six months, it would have been good, and within the submission. And the only difference is, that here no time is limited in the condition, and therefore a greater latitude is given.

The bond was given by *Robert Armstrong & Co.* to *Robert Robinson & Co.* The suit is against *Robert Armstrong*, and the declaration alleges, that *Robert Armstrong* acknowledged himself to be held, and firmly bound unto *Thomas Robinson* and *Robert Robinson*, by the name and style of *Robert Robinson & Co. &c. &c.* It is difficult to believe, that the objection raised to this mode of declaring was seriously made, or much relied upon.

It is an established rule, that in actions founded upon contract, whether by parol or deed, if the demand or cause of action be joint, all the parties, if alive, must join in bringing the action, which should properly be in their names, and not in the name of the company, or firm, where it is a company, or firm, that has the cause of action; and that, as far as appears from the record, is what has been done here; the appellees, *Thomas* and *Robert Robinson*, alleging in their declaration, that the undertaking was to them by the name and style of *Robert Robinson & Co.*



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If *Thomas* and *Robert Robinson*, are not the only members of the firm of *Robert Robinson & Co.* to whom the bond was given, the appellant might have availed himself of the non-joinder, by proof at the trial, or he might have pleaded that matter in abatement, which was not done. And if it had appeared on the record by the pleadings, he might have taken advantage of it by demurrer. But not appearing on the record, even if the fact exists, it cannot be reached by the demurrer in this case, and the mere mode of declaring is not obnoxious to any objection arising upon the demurrer. It is a correct mode of declaring, and it is always sufficient, if the plaintiffs are proved to be the members of the company or firm, and the persons meant by the name and style used in the instrument.

Whether the suit was properly instituted against *Robert Armstrong*, is a question not open on the demurrer. It does not appear on the record, that there was any other person jointly bound in the bond with *Robert Armstrong*, who was living at the time the suit was brought, and who should have been joined in the action. It does not appear upon the record, nor is it a presumption of law, that *Robert Armstrong*, and *Robert Armstrong & Co.* are not one, and the same person, or that there was any other person living at the time the suit was brought, belonging to that firm, and bound, by the bond, except *Robert Armstrong*; and not appearing on the record, if there was any such person so bound, and alive when the suit was brought, the appellant should have taken advantage of the non-joinder by a plea in abatement. As to the supposed variance between the bond produced, and the bond declared upon, it is not perceived to exist. The proferit brought the bond into court, and by the *oyer* it was spread upon the record, and made a part of the declaration to which the plea was pleaded. And being thus made a part of the declaration, and admitted by the plea of no award within three months from the date, of and concerning the matters in the conditioned mentioned and referred, there is no variance between

the bond declared upon, and the bond produced; the record showing the bond declared upon to be a bond of *Robert Armstrong & Co.*, and the bond produced, being a like bond of *Robert Armstrong & Co.*

In declaring on a bond, it is not necessary to set it out *it hæc verba*, but it is sufficient if it is stated according to its true legal effect and operation. If there were other persons than *Robert Armstrong* belonging to the firm, he was not competent to bind his partners to the submission. The bond therefore, though not binding on such partners, was his bond, and binding on him. And being his bond, it was declared upon according to its true legal effect. It makes no difference that it was given in the name of *Robert Armstrong & Co.*, it was not the less his bond, and the suit could not properly have been brought against *Robert Armstrong & Co.*, not being a corporation. It is objected that the award does not pursue the submission; and if so, it is certainly bad. It is necessary then to see what was submitted, and what the arbitrators have awarded.

The submission is of "several difficulties existing in the settlement of monied and commercial concerns, between *Robert Armstrong & Co.* and *Robert Robinson & Co.*" *Robert Armstrong*, by the name and style of "*Robert Armstrong & Co.*" bound himself, that *Robert Armstrong & Co.* should comply with the award of the arbitrators, and the award is, "that *Robert Armstrong* shall pay, or cause to be paid, by *Robert Armstrong & Co.* to *Robert Robinson & Co.* the sum of \$4500, in full of all claims, accounts, and demands whatsoever, between *Robert Armstrong & Co.* and *Robert Robinson & Co.*, arising out of the commercial and monied transactions between the companies," with a provision for mutual releases between the companies, in relation to the matters submitted.

The award then being an adjustment of all the monied and commercial transactions, between *Robert Armstrong & Co.*, and *Robert Robinson & Co.*, it is so far, clearly within the submission. And as to the sum awarded to be

paid to *Robert Robinson & Co.*, it may be considered as in effect an award, that *Robert Armstrong & Co.* should pay it; being awarded on account, and in full of all the demands against them, which were submitted to the arbitrators; and the direction being that *Robert Armstrong & Co.*; or viewing it as an award that *Robert Armstrong* shall pay it, it does no more than follow the condition of the bond, which is, that *Robert Armstrong & Co.* shall comply with the award. He could not bind his partners if there were any others alive belonging to the firm; but he could, and did bind himself, (the bond according to its legal effect being his alone,) that *Robert Armstrong & Co.* should comply with the award of the arbitrators. He undertook in behalf of the company to submit the matters in dispute, which did not bind his partners, if he had any who were alive, but it bound him so far as his interest was concerned; and he might very well bind himself in an undertaking that the others, or that he and the others, should comply with the award. And being a party to the submission, and bound on behalf of the company, and the award being expressly upon the matters submitted, it is not a sufficient objection to the award, that it directs the money to be paid by him, who on his own account, and on behalf of others, in nature of a surety was bound for the payment of it. The award, in directing that he shall pay the sum awarded, or cause it to be paid by *Robert Armstrong & Co.* only directs that he shall do what by his bond he bound himself should be done; and for the neglect or refusal to do which by the company, if the award had been that they should pay it, he would have been subjected to an action on the bond, and a payment of it would discharge the company from all liability to *Robert Robinson & Co.*, on account of the matters submitted to the arbitrators. The award therefore, is in effect the same as if it had been that *Robert Armstrong & Co.* should pay.

Moreover, it does not appear from the record, (and the law does not presume it,) that there is any other person



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living than *Robert Armstrong*, belonging to the firm of *Robert Armstrong & Co.*; or that *Robert Armstrong* and *Robert Armstrong & Co.* are not one, and the same person. And in support of the award, it will be intended that they are; as if it was not so he must know it, and if material might have shown it, which he has not done. There is no objection therefore, either to the award, or the breach assigned. *Robert Armstrong*, as far as appears upon the record, being the only person from whom the money directed to be paid was due; and the award that he shall pay, or cause it to be paid, &c. being in effect, a direction that he shall pay what he himself owes. And if the award had been that *Robert Armstrong & Co.* should pay, it would have been equivalent to a direction that he should pay.

JUDGMENT AFFIRMED.

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JOHN GLENN vs. THE MAYOR AND CITY COUNCIL OF  
BALTIMORE.—*December, 1833.*

The act of 1817, ch. 148, so far as regards the power of the *Mayor and City Council of Baltimore*, to pass ordinances for the prevention and extinguishment of fires, does not extend the previous powers conferred by the original charter of that city upon that subject.

Where an ordinance of the city of *Baltimore*, does not in terms disclose that it is in the fulfilment of some one of the specific powers granted by the charter of that city, or it is not so connected by its subject matter with the powers conferred, that the court can judicially determine it to be made in the exercise of its chartered privileges; it becomes a question of fact, whether such ordinance was properly passed or not; and the burthen of proof is upon the party claiming under it.

So where an ordinance prohibited the carrying on any distillery of spirits of turpentine or varnish, and did not purport to be passed for the prevention of fires, the court HELD, they would not judicially determine whether such prohibition was calculated to prevent danger from fires, but referred it to a jury to determine whether it was in any degree calculated to effect that object.



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The ordinance of March, 1826, passed by the corporation of *Baltimore*, prohibiting the erecting, establishing, or rebuilding of certain factories within the limits of direct taxation in said city, was not intended to interfere with any then existing establishment, nor to prevent its being merely repaired; and where one of such factories was injured by fire, and its business stopped, it becomes a question of fact whether it was rebuilt or repaired. If the destruction was so great as to require the house in which it was carried on to be rebuilt, it must then come within the prohibition.

APPEAL from *Baltimore City Court*.

This is an action of *Debt* instituted by the appellees against the appellant, January 22d, 1833, to recover the sum of \$200, in virtue of an ordinance of the 9th of March, 1826; whereby it was "enacted and ordained, that no person or persons should thereafter erect, establish, or rebuild, or carry on in such building within the limits of direct taxation, any distillery of spirits, or turpentine, or varnish, or manufactories either of earthen or stone wares, or or slaughter house or houses, or soap, or candle manufactory, under the penalty of \$200; and a further sum of \$50 for each and every month thereafter, until the same be removed out of the said limits, or pulled down."

The defendant pleaded *nil debet*, and issue was joined.

1. At the trial the plaintiff proved that the defendant owned a turpentine distillery within the taxable limits of the city of *Baltimore*; which on the 16th of December, 1832, was materially injured by fire. The witness proved, that two days after the fire, he examined the premises at the request of the *Mayor* of the city. He found the *north* gable end off to the square; the *east* end wall was about half down; the *south* gable end wall totally down; the front was standing, but partially injured by the fire; the wood work all burned. The body of the still was enclosed in brick, and was not from that circumstance susceptible of injury. Some slight injury was done to the cap, which was repaired, as was also the building, owing to which, and the inclemency of the weather, there was an interval of a month before operations were resumed.

The plaintiff then prayed the court to instruct the jury,

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that if they believe from the evidence, that the distillery, and messuage of the defendant, mentioned in the pleadings, and the evidence, were so much injured by fire, as to require repairs to the apparatus of the still, or any part of it, before it could be used ; and that the building was burned, as is stated in the evidence ; and that the defendant rebuilt the house, and repaired the apparatus, and has resumed by himself, his agents, or his tenants, the business of a turpentine distillery in the messuage so rebuilt, before the institution of this action, that then the plaintiffs are entitled to a verdict. Upon this prayer the court instructed the jury as follows. That if they should find from the testimony, that the defendant was the owner of the turpentine distillery mentioned in the declaration, and that the damage done to the building in which it was carried on, whether by fire or otherwise, was so considerable as to put a stop to the further prosecution of the business, whilst it remained in that condition ; and that the defendant afterwards restored the said building to its former condition, by repairing the walls, and putting on a new roof, and thereupon resumed the distillery of turpentine or varnish in said building ; he has thereby violated the ordinance of the 9th of March, 1826, referred to in the declaration, and is liable to the penalties for which this action is brought, and that the jury must find for the plaintiffs. If on the contrary, the testimony will not support the above, they must find for the defendant.

The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Meredith* and *Johnson* for the appellant, contended.

1. That the section of the ordinance of the 9th of March, 1826, upon which this action is brought, is not within any of the powers conferred on the corporation by the charter,

or any supplement thereto, and is therefore void. Act of 1796, *ch.* 68; 1817, *ch.* 148, *sec.* 7; 1797, *ch.* 54, *sec.* 2.

2. That according to the true construction of said section, a total demolition of the building erected or established, was intended, and contemplated, and the court below erred in directing the jury, that if the said building was only partially injured by fire or otherwise, so as to put a stop to the carrying on the distillery whilst it remained so injured, the appellant had no right to repair the building, and resume the operations of said distillery.

*Scott and Belt*, for the appellees.

1. The authority of the corporation to pass the ordinance in question, is fully established by the cases of *The Mayor and City Council vs. Barron, survivor of Craig and Koster*, decided by this court.

2. The ordinance though penal in its character, being calculated, and intended to promote the general welfare, is entitled to a liberal interpretation. 6 *Bac. Abr. Title Statute*, 378, &c. *Mayor and City Council vs. Moore & Johnson*, 6 *Harr. and Johns*. 380. *Dugan vs. Mayor and City Council*, 1 *Gill and Johns*. 499. It is shown by the evidence, that the injury was such as to interrupt for a considerable period the operations of the distillery; and it is no answer to say that the injury was confined to the building, as it is impossible to distinguish between the building and the machinery. The establishment consists of both united, and neither without the other could exist within the contemplation of the ordinance.

ARCHER, J., delivered the opinion of the court.

The instruction given by the court to the jury, and which forms the subject of inquiry, involves the consideration of the ability of the corporation, to prohibit the erection, and establishment of a turpentine distillery, and the rebuilding of a distillery, which had been in operation previous to the passage of the ordinance.



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The corporation by its original charter possesses the power to pass by-laws, for the prevention, and extinguishment of fires, and to prevent and remove nuisances, and by the act of 1817, *ch. 148, sec. 7*, power is conferred upon the corporation in the following words. "The said *Mayor and City Council*, shall possess all power, necessary or proper, for preventing nuisances, preserving order, securing property and persons from violence, danger or destruction, protecting the public, and city property, rights and privileges, from waste or encroachment, and for promoting the great interests, and securing the good government of the city, not repugnant to the rights of the citizen, or inconsistent with the provisions of any act of the General Assembly of this State, or the constitution thereof." Under these various grants the power in question is claimed.

The act of 1817, in its clause above quoted, so far as regards the present question, perhaps does not confer any extended authority, and the power must rest on one of the two grants of power, which were originally given in the charter of 1796; *the power to prevent or remove nuisances, and the power to prevent fires*. On which of these the claim to impose the penalty in question, is reposed by the city authorities does not appear. The ordinance of the 9th of March, 1826, contains *no* preamble reciting the existence of such distilleries as a nuisance, or that their establishment, or operation, were calculated to increase the dangers arising from fires, nor does the title of the ordinance indicate that it is in the fulfilment of any one specific power. We are therefore, left at large to examine the whole catalogue of powers to ascertain its validity, and we perceive no other grant of power upon which it could be sustained, but one of the two which have been mentioned.

The validity of many ordinances are at once perceived, because they appear upon the face of them to be in the execution of a delegated power. Of this character for example, would be such ordinances as relate to the laying out of new streets, the establishment of night watches, the erec-



tion of lamps, the providing for the general survey of the city, laws for cleaning and deepening the basin, and many other powers of the like description, which it is unnecessary to enumerate.

But the power to prevent fires, and the power to remove nuisances, are grants of a totally different description, and there may be just, necessary, and proper exercises of these powers, which the court cannot judicially see. Thus, whether the various manufactories spoken of in the 17th section of the ordinance, are calculated to endanger the habitations, or the health of the inhabitants, may be a matter of science, upon which possibly a diversity of views might be entertained, and thus the legitimate exercise of the power might become a mixt question of law, and of fact. The city authorities might pronounce that to be a nuisance, which evidence might show was not a nuisance. They might prohibit a particular occupation upon the ground, that it increased the danger of fire, when the reverse could be shown by the concurring testimony of all men. The power therefore, or the want of power to suppress a particular occupation as a nuisance, or as a means of preventing fire should be shown in the proof.

It is true the corporation have power to pass all laws, which are necessary or proper to carry into effect any given power, and the degree of its necessity or propriety would not be minutely, or critically scrutinized; but the court ought to see that it may be the means of accomplishing the object of the grant. The degree of the necessity would indeed be properly, perhaps, the subject for the judgment of the corporation, but that it contributes in any degree, would be for the determination of the court. Now that the prevention of such occupations, as are under certain circumstances prohibited by the ordinances under consideration, would in any degree be a means of preventing fires, or of removing nuisances, must be disclosed by evidence. None is produced, and we therefore think, upon this ground, the court were wrong in their direction to the jury, that if

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they found the facts proven in the bill of exceptions to be true, they must find for the plaintiff.

We also conceive, that the court below erred in the construction which they put upon the 7th clause of the ordinance. That section is in the following words. "Be it enacted and ordained, that no person or persons shall hereafter erect, establish, or rebuild, or carry on in such building, within the limits of direct taxation, any distillery of spirits, or turpentine, or varnish, or manufactories either of earthen ware, or stone ware, or slaughter house or houses, or soap, or candle manufactory, under the penalty of two hundred dollars, and a further sum of fifty dollars for each and every month thereafter, until the same be removed out of said limits, or pulled down.

It was obviously not the intention of the corporation to interfere with any existing establishment, and it might perhaps be well questioned whether they could give a retrospective operation to the law. They aimed at the prohibition of any new establishment, and at the rebuilding of any old establishment. The repair of any manufactory of this description was not forbidden, nor could it well be. The stoppage of the distillery might be occasioned by a damage done to the building, and yet that building might only require repair, and not rebuilding. Thus, suppose the roof was so much consumed by fire, that the owner could not with advantage carry on his customary operations, could the reparation amount in legal contemplation to a rebuilding? This would be the mere amendment of the roof, or the putting a new roof on an old building, or in other words, repair, and not rebuilding. The difficulties attending the court's direction, grow out of their not having distinguished between the repair of the distillery, and its being rebuilt. Reparations, and rebuildings, sometimes, so nearly approximate to each other, that it may be said, they are separated by invisible lines, but in general, the distinction between these two words, is obvious to every man's understanding; and although it may sometimes be difficult to mark

the boundaries between them by intelligible definitions, we are inclined to think, that so far as regards the building in question, if its walls were injured, and thrown down to the extent of more than a half, and its roof destroyed, it could not be re-established otherwise than by *rebuilding*.

But it is supposed, that although the house in which the manufactory was carried on might have been rebuilt, yet as the distillery apparatus only required repair, and that only to the extent of nine-tenths of its value, that therefore the re-erection of the building, and the repair of the apparatus, did not render the proprietor obnoxious to the provisions of the ordinance. Were this construction to prevail, the ordinance might be rendered nearly ineffectual. The still itself is enclosed by a brick wall, and is the most costly part of the structure; and being thus protected, is scarcely susceptible of injury; for we perceive, notwithstanding this destructive fire, it was entirely uninjured. Repair, from time to time, to supply defects from gradual wear and use, might preserve it for an indefinite period, and no matter what injury might be done to the other less expensive part of the apparatus more liable to injury, or the walls which enclose the still, or to the building itself, if this construction were to prevail, there could be scarcely any such thing as the rebuilding a distillery.

The distillery in truth, in contemplation of the ordinance, as it is in common parlance, may be said to consist of the external structure, the building itself, and the internal structure, the distillery apparatus. These conjointly constitute the distillery, and any injury which requires the rebuilding of either would be a violation of the ordinance. The erection of a building for the purpose of a distillery would constitute no offence, for it does not assume the character of distillery until the internal apparatus is supplied. But when the internal structure exists in whole, or in part, the erection of a house over it, which is necessary for its more perfect operations, would be clearly within the just construction of the ordinance.



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It is true the building itself, and the machinery for distilling may exist separately; and if the proprietor having sustained a partial injury in the machinery, has chosen to risk the success of his manufactory without rebuilding the house which enclosed it, or in other words, had chosen to work it in open air, if indeed such an operation were practicable, he might have done so, the corporation not having condemned repairs. But this being admitted to be so, will not affect the question of his liability if he rebuilt the house which encloses it; for such building is ordinarily, nay universally, a portion of such an establishment. Nor can this question be made depend upon the comparative cost of the building, and of the distillery apparatus. Although the house which encloses the machinery, may in cost be inconsiderable when compared with the worth of such machinery, the ordinance looks to the rebuilding of either the one or the other as punishable.

From these views it would follow, that if the plaintiff below had offered evidence, that the establishment of a distillery, like the one in question, was dangerous to the habitations of the citizens by increasing the hazard of fire, or that it was a nuisance, in addition to the evidence which the record contains, he might have subjected the defendant to the penalties of the ordinance.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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**BIRELY'S EXR'S & HOLTZ vs. JOHN AND JOSEPH STALEY,  
*et al.*—December, 1833.**

Rules of pleading in equity are not to be governed by the same technicality as to matters of form, that controls proceedings at law. Courts of equity look to substance, not form.

One creditor may proceed in equity to vacate conveyances void under the statute of *Elizabeth*, and if successful, the fund arising from the sale of the



property covered by them may be retained in court until the other creditors are notified to come in, and assert their claims to participate.

It is a general principle, that where a creditor seeks the aid of a court of equity to pursue property fraudulently conveyed away, a judgment must be first obtained against the debtor, before his lands fraudulently granted can be reached; in such a pursuit against personal property, a *fi fa* also must first have been issued: but where the debtor died after suit brought at law, and before judgment, and the answer set up no such defence, this principle does not apply.

Where creditor's claims to relief rest upon liens to be acquired through judgment or execution, it follows as a necessary consequence, that out of the fund pursued, if land, they must be paid according to the seniority of their judgments; if personal property, according to their respective priorities acquired by the delivery of their several *fi fa*'s to the sheriff.

But a court of equity in *Maryland* would not give any such priority to a creditor who had judgment merely against an administrator of his debtor. All creditors without judgment in the life-time of the fraudulent grantor would come in *pari passu*.

A judgment against an executor or administrator, not only does not bind real assets, but is not even *prima facie* evidence of a debt, where the real estate of a deceased debtor has been sold for the payment of debts due by him.

A creditor of a deceased party cannot obtain judgment against his heirs where they have no assets by descent.

Where a court of equity is satisfied from the facts in the cause, that a deceased debtor left no personal estate to be administered, they will not require letters to be taken out, or proceedings against an administrator to be shown, though under other circumstances, such measures might be deemed necessary to make proper parties to the suit.

To a bill to vacate conveyances, charged to be fraudulent and comprising all the grantor's real estate, the defendant, his grantee, denied the facts, and averred, that after the delivery of the deed to him, the grantor was seized, and possessed of real estate both in F and M counties, abundantly sufficient, as he believed, to pay complainants. **HELD**, that the fact of the grantor's owning other real estate in F and M counties was in issue in the cause, and being an affirmative allegation in the answer, the burthen of proof was on the defendant.

The mere production of deeds of conveyance, unaccompanied by any proof of the existence of the property conveyed, and the title of the grantor thereto, or his possession thereof, or the possession thereof by the grantee, is wholly insufficient to prove that the grantee had the property described in the conveyance, or that it was a fund out of which creditors might have been satisfied.

To prevent a court from vacating a conveyance made to hinder and delay creditors, on the ground that the grantee had sufficient property indepen-

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dent of that conveyed to pay his debts, it must appear, not only that it was sufficient to pay the complaining creditor, but all the grantor's creditors.

A deed otherwise void under the statute of *Elizabeth*, cannot be sustained on the ground of a secret, or oral contract between the grantor and grantee, that the property conveyed should be held in trust for the benefit of all the creditors of the grantor. A secret contract so made could not be enforced either at law or in equity, at the suit of the grantor or his creditors.

Evidence obtained upon leading interrogatories will not be rejected at the hearing, where the same facts are obtained from the same witness, upon other interrogatories not liable to that objection.

**APPEAL** from the equity side of *Frederick* county court.

This bill was filed on the 15th of February, 1823, by *Elizabeth Birely*, the testatrix in her life-time, and *Nicholas Holtz* against the appellees. It stated that *Jacob Staley*, deceased, on the 16th of October, 1821, was indebted to the complainant by notes, single bills and bonds, to a large amount. That suits on that day were pending in *Frederick* county court, on said notes, &c. against the said *Staley*, (as will be seen by exhibit No. 2,) who at the time thereof, and for many years before, had possessed a large real and personal estate, the whole of which real estate, by a deed of bargain and sale on the said 16th of October, 1821, he conveyed to *John* and *Joseph Staley*, (the appellees,) his two sons, which deed the complainants charge to be fraudulent, and covinous, and made for the purpose of disturbing, hindering, and delaying them, and the other creditors of the grantor. That afterwards, on the 20th of October of the same year, the said *Jacob Staley* executed a bill of sale to his said sons, of all his personal property, they then well knowing, that their father was indebted to these complainants as aforesaid. That he continued so indebted at the period of his death, and that he died intestate, and insolvent in March, 1822. That the said bill of sale also is fraudulent and void, as against the creditors of the grantor. *The prayer* of the bill is, that the deeds may be vacated, the property sold for the benefit of the creditors of the grantor, and for general relief.

*Exhibit No. 2*, being transcripts of docket entries, showed among other things, that a judgment was rendered against *Jacob Staley*, at the suit of *Elizabeth Birely*, on the 24th of October, 1821, for \$1000, with interest from 1812, and costs. That a *fieri facias* issued thereon to March court, 1822, which was returned *Nulla Bona*.

The answers of the appellees, *John* and *Joseph Staley*, say, that they are willing to admit, though they have no personal knowledge on the subject, that the notes, bonds, and single bills exhibited by the complainants, show truly the amount due from *Jacob Staley* to them; and that suits were pending on them as alleged on the 16th of October, 1821. They deny that the deed executed by the said *Staley* to them on that day, conveyed his whole real estate; on the contrary they aver, that after the delivery to them of said deed, he was seized and possessed of real estate, both in *Frederick* and *Montgomery* counties, abundantly sufficient, as they believe, to pay the claims of the complainants. They deny that said deed was executed with a covinous, or fraudulent intent, or for the purpose of disturbing, hindering, or delaying any of the creditors of the grantor; and allege that the same was made *bona fide*, and for a good and valuable consideration. That the bill of sale of the personal property was also for a *bona fide*, and valuable consideration. They admit that at the time of their execution, they were informed, and believed that suits were pending against *Jacob Staley*, but to what amount they did not know, nor did they know that he was insolvent. They also admit that he died intestate, and insolvent.

The answers of the other defendants are not supposed to be material.

A general replication was filed to the answers, and a commission issued, under which proof was taken and returned; but as the evidence has no necessary connexion with the questions of law decided by the court, it is omitted.



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It was agreed that the transcripts of the docket entries exhibited by the complainants, should be considered as if complete records had been made in those cases, and exhibited in this case.

The court (SHRIVER, A. J.) dismissed the complainant's bill with costs, upon which the record was brought by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Taney, (Att'y Gen'l U. S.) Palmer, and Duckett, for the appellants.

1. It has been objected, that this bill was filed by two, of many creditors. The answer to this objection is, that whether the unnamed creditors are parties or not, still according to the principles, and practice of the chancery court, they have a right to come in after the decree, and participate in the fund. They are therefore, in *substance*, parties, though not made so in terms by the bill. The same strictness in pleading is not observed in chancery as at law. *Tiernan vs. Poor and Wife*, 1 Gill & Johns. 230: This bill is essentially a creditor's bill. *Strike vs. McDonald and Son*, 2 Harr. and Gill, 220. *Ib.* 232, 233.

2. The next objection is, that there is no allegation that the complainants were creditors at the time the bill was filed. But the averment is, that *Staley* was their debtor by bonds, &c. at the date of the deeds, and that he died indebted, and insolvent; and as the bonds, &c. the evidences of the debt are produced, the legal presumption is, that they were unpaid when the bill was filed. It is a conclusion of law, and need not be averred.

3. The answer to the objection, that the complainants do not aver themselves to be judgment creditors, is that the record shows that fact, and as the whole record is exhibited, and made a part of the bill, it must have the same effect as if it had been copied into it. In *England*, the practice



is to copy the exhibit in the bill. In *Maryland* the practice is different, it is merely referred to, and the prayer, that it may be taken as a part of the bill, gives it the same effect as in *England*. By such prayer every part of the exhibit is considered as being actually incorporated into the bill. It is not merely evidence, but a part of the pleadings. If the object was simply to make it evidence, the proper, and regular course would be to file it with the commission. Every fact contained in the exhibit is in substance brought before the court, by the prayer, that it may be made a part of the bill or answer. Suppose a party pleads a deed to which recording is necessary, can it be said, that he must *aver* that it was recorded, although the deed itself shows that it was recorded? The reference to the exhibit, was to show the situation of the debt at the time the bill was filed, and it appears that it had been brought to judgment, and that a *feri facias* upon it had been returned *nulla bona*. The allegation however is, that the debt was in suit, and such was the fact notwithstanding the judgment, as the plaintiff was still pursuing his legal remedy to recover the money. It is evident the pleader so understood the word suit, and though he may have been mistaken as to its technical meaning, if the court can see clearly what was intended it is sufficient. *Tiernan vs. Poor and Wife*, 1 *Gill and Johns*. 230.

But it was not necessary to allege that judgments had been recovered. The deeds are assailed upon the ground of fraud, which alone gives the court complete jurisdiction. There is nothing in the statute which says that the party seeking to set aside a deed upon the ground of fraud must be a judgment creditor. This is not like those cases on which the chancery jurisdiction depends upon some defectiveness in the legal tribunals. The jurisdiction here is original, and concurrent, and the relief likewise is original, and not ancillary. In *Brinkerhoff vs. Brown*, 4 *Johns. Ch. Rep.* 679, there was in fact no judgment at the time the bill was filed, and the court does not say if

there was it must be pleaded. Contracts required by the statute of frauds to be in writing, need not be averred to be in writing, though the proof must show them to be so, and therefore it does not follow, that because a judgment is necessary to be proved, that it must be pleaded. But it was not necessary either to allege, or prove a judgment to have relief against these deeds.

In the first place, it is not a bill by a single creditor, but is substantially on behalf of all the creditors of the grantor. It prays that the property may be sold for their benefit, and of course, if there are judgment creditors, they would have the benefit of the fund. The proceeding is not under the act of assembly, which only gives the creditor a right to resort to the land, after the personal estate is exhausted. If in this case, the complainant should be required to sue the administrator, his judgment would not have been evidence, either against the heir at law, or the grantee. *Harwood vs. Rawlings' Heirs*, 4 *Harr. and Johns*. 126. *Gaither & Warfield vs. Welch*, 3 *Gill and Johns*. 262.

These deeds are good as between the parties to them, and of course the personal estate conveyed by them would not have been assets in the hands of the administrator; and as regards the land, a judgment against the administrator would not have been evidence to affect it. If the property in these deeds was only secondarily liable, the objection might be a good one, but they being fraudulent, the creditor has a right to go against it in the first instance. As real estate in *Maryland* is liable to be sold for simple contract debts, a judgment could not be required to create a lien upon it. The cases cited on the other side merely decide, that a judgment is necessary when the jurisdiction of the court of chancery is subsidiary, and not original, and concurrent, as here. *Coop. Pl.* 149. *Smithier vs. Lewis*, 1 *Vern.* 398. 1 *Eq. Cases Abr.* 132. *Copis vs. Middleton*, 1 *Mad. Rep.* 556. The *American* cases establish the same proposition. It will be found in them all, that where judgments have been decided to be necessary, it has been

where chancery has been called upon to aid a court of law. and not to exert an original jurisdiction. And they are cases where a party seeking the aid of the court, has been asking for a preference; and not as here, that the property should be sold for the common benefit of all the creditors, according to their several rights. *Wiggins vs. Armstrong*, 2 Johns. Ch. Rep. 144. *Hendricks vs. Robinson*, lb. 296.

The case of *Sluby and Jones*, in 5 Harr. and Johns. 381, was the case of a voluntary conveyance, and was only fraudulent if there were no other sufficient assets; and therefore the party impeaching it, was bound to show such insufficiency by proceedings at law. The circumstances of this case are materially different. Here the deeds are charged to be void, as being made to hinder and delay creditors, and if that effect is produced, it is of no consequence whether there are any other assets or not. Now if the fact should be, that there is other property in *Montgomery* county and elsewhere, as alleged in the answer, (though there is no proof of it,) still the creditors would be hindered and delayed, if they are compelled to go there in search of it. The cases which decide that a deficiency of the personal estate must be shown, are cases in which that deficiency is the basis of the equity jurisdiction to charge the land.

If however, this objection would have been valid at a different stage of the proceedings, and in a different way, still it cannot be made at the final hearing. It should have been taken by demurrer.

4. As to the objection that the personal representative should be before the court. Now in the first place the debt is admitted, and it is admitted that the deceased left no personal assets. Where then the necessity for the personal representative. He could neither controvert the debt, nor contribute to its payment. Besides, as these deeds are good as between the parties, all who have any interest are in fact before the court. *Dorsey vs. Smithson*, 6 Harr. and Johns. 61. And moreover, as the liability of this property does not depend upon the insufficiency of the other proper-



ty, there could be no necessity to make parties of those who are entitled to the other property. The property contained in the bill of sale, would not be assets in the hands of the administrator, nor would the land descend to the heir at law. *Dorsey vs. Smithson*, 6 *Harr. and Johns*. 61.

*William Schley* and *F. A. Schley*, for the appellee.

It is necessary to examine the *pleadings* as well as the *proof*. The record presents some interesting points, apart from the main questions on the merits.

The bill charges that the two deeds severally marked No. 3 and 4, were made with intent to delay, hinder, and defraud the grantor's creditors. The object of this bill is to vacate these deeds, and to obtain, as consequential relief, a decree for the sale of the real and personal property which they embrace. The bill is preferred by *two* of the grantor's creditors. They show that there are many *other* creditors, and that some of those other creditors hold *judgments* against the grantor, of an anterior date to any judgment of either of the complainants. This introduces a question of practice.

1. Ought not the other creditors to have been made parties to this proceeding, either in fact, or at least by representation of their interests?

(1.) *As mere creditors*. Two of many creditors cannot file such a bill independently; they must make all the other creditors parties, either *in fact*, by conjoining them as complainants, or by calling them in as defendants; or else by *representation* of their interests, by exhibiting the bill expressly in behalf of the complainants, and all other creditors who may come in, &c. *Leigh vs. Thomas*, 2 *Ves. Sen.* 312. *Hendricks vs. Robinson*, 2 *Johns. Ch. Rep.* 296.

(2.) *As incumbancers*. The judgment creditors are interested not merely in the result of this suit, as are creditors at large; they are in fact *incumbancers*, and have a *lien* on the real estate which is now sought to be sold. Even



if the general principle above asserted cannot be maintained, still *this* branch of the objection is directly within the rule, "that all the parties interested in the *subject matter*, should be brought before the court." *Coop. Plead.* 33. *Cromwell vs. Owings*, 6 *Harr. and Johns.* 10. *Darne & Gassaway vs. Catlett*, 6 *Harr. and Johns.* 475. The rule is broadly laid down in *Clark vs. Long*, 4 *Rand.* 451. This is a proceeding *in rem*. It is not analogous to cases of proceedings to compel the performance of *a trust*; as by a legatee, or by a creditor against an executor, *in respect of* assets in his hands. Such latter proceedings are merely *in personam*. *Attorney vs. Cornthwaite*, 2 *Coxe's Cas.* 43. *Bedford vs. Leigh*, 2 *Dick.* 708.

2. The second point has relation to the requisite certainty in pleadings in equity. The complainants do not show, by any of the averments of their bill, either by direct allegation, or by the statement of *facts*, from which it would result as a legal consequence, that they were then creditors when the bill was filed.

(1.) Is this necessary? At law it would be clearly so. There it is not sufficient to show in a declaration, that a right of action existed at some given antecedent day. A subsisting *present* right must be shown. The plea of *solvit post diem* for example, would cover the whole time up to the day of the impetration of the writ; the declaration must have a like scope, or it would be insufficient on demurrer. The breach must be that the defendant hath not yet paid, &c. The position may be aptly illustrated by the familiar case of an action of debt against an executor. It will not suffice to aver non-payment by the testator; you must go further, and aver non-payment by the representative. It is admitted, that in equity the same categorical certainty is not required in all cases as at law; but whatever is necessary to make out the complainant's *title*, must be positively averred. *Coop. Pl.* 5, 6. So whatever is necessarily within the complainant's knowledge. *Ib.* And in general, there must be the same strictness in equity as at

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law. *Mif. Pl.* 294. *Beames' Pl. in Eq.* 8. 2 *Atk.* 632. 1 *Mont. on Pl.* 26.

(2.) If then this be necessary, has it been sufficiently averred?

The bill was filed on the 10th February, 1823. The complainants say that the grantor was indebted to them, severally, on the 16th October, 1821; and that he was indebted *at his death*, which occurred in March, 1822; and that he died *insolvent*. Now if it follows as a legal conclusion, that because the grantor was their debtor when he made these deeds, and that he *died* so indebted, and was then *insolvent*, the debts continued unpaid, and in action, up to the time of filing this bill; then the averment of *these facts* is tantamount to an averment that the debts *were* subsisting, and unpaid when the bill was filed, but if such legal conclusion does not follow, then the averment is *not* tantamount, and not sufficient. The distinction must be kept up between *pleading* and *evidence*. If the complainants had sufficiently averred that their claims were subsisting, and the answer had denied the allegation, and the parties were *at issue* upon this *fact*, under the general replication; then evidence that the grantor was indebted at his death, would, upon the presumption of continuance, be sufficient to throw upon the defendants, the necessity of showing a subsequent discharge. It would in other words, be open to the defendants to show, if they could, such subsequent discharge. They might prove *payment* by the heirs at law, by the personal representative, or by the sureties. So they might show *a release*. The fact that the grantor "died insolvent," does not essentially vary the case. The term "insolvent" does not import either in fact or in law, that he left *no assets*. He may have left enough to pay *judgments*. A man is 'insolvent' who has not "*assets*" to pay *all* his debts in *full*. The hypothesis, therefore, that the complainants had no subsisting claims, is not wholly inconsistent with the facts alleged. The grantor may have been indebted to the complainants as alleged, and may

have died insolvent; and yet the complainants may have ceased to be creditors when the bill was filed.

3. The complainants are not in a condition to maintain this suit. In order to impeach these deeds, they ought to have pursued some further preliminary steps at law. To entitle them to affect the deed No. 3, they ought to have obtained judgments on their claims, so as to create a lien on the real estate of their debtor: and in order to reach the deed No. 4, they ought also to show the issuing of writs of *fiery facias*, and the return of *nulla bona* thereon, so as to show a lien on the personal property. They ought, in fine to show, that all remedies at law had been exhausted.

(1.) Is it necessary thus to show a lien? It is a question of practice of much interest. That it is necessary, is laid down in many authorities. *Coop. Eq. Pl.* 149. *Mitf.* 115. *Wiggins vs. Armstrong*, 2 Johns. Ch. Rep. 144. *Hendricks vs. Robinson*, 2 Johns. Ch. Rep. 296. *Brinkerhoff vs. Brown*, 4 Johns. Ch. Rep. 677. *Screven vs. Bostick*, 2 McCord's Ch. Rep. 416. *Rhodes vs. Cousins*, 6 Rand. 190. *Gilpin vs. Davis*, 2 Bibb, 416. The point has never been expressly ruled in this State. In all the cases, save one, the complainants had obtained judgments, and sued out execution; and in *Jones vs. Slubey*, 5 Harr. and Johns. 381, the Chief Justice remarks, that the complainant there had done every thing to entitle him to the aid of a court of equity. In the cases of *Strike vs. McDonald*, 2 Harr. and Johns. 191, the question was presented by the counsel in argument; but its consideration in this court was necessarily occluded by the decision, that nothing which had been done in the cause, whilst it was pending in Baltimore county court, antecedent to its removal into the court of chancery, could be reviewed upon an appeal from the court of chancery. The question was not open on the record.

(2.) If, then, this be necessary, has it been sufficiently shown by the bill? The complainants do not say, in the body of their bill, that they are judgment creditors. They



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say, that when said deeds were made, they were creditors, by *notes*, *single bills* and *bonds*, as shown by exhibit No. 1, to which they refer as part of their bill. Exhibit No. 1 is a copy of *notes*, *single bills* and *bonds*. They also say that the said deeds were made whilst *suits* were then pending on their said claims, and they refer to exhibit No. 2, in support of this averment. They also say, that the said grantor was indebted *as aforesaid*, at the time of his death. If the complainants, therefore, are to be held strictly to their allegations, they do expressly aver that they are mere creditors at large, upon *notes*, *single bills* and *bonds*. Can they now affect to be creditors of a higher grade—judgment creditors? It is true, that exhibit No. 2, contains memoranda of *judgments* recovered by *Mrs. Birely* on all her claims, and of the issue of a *fieri facias* on one, and a return of *nulla bona* thereon. This exhibit is twice referred to in the bill; and, in both instances, to uphold the allegation that *suits* were pending when the deeds were made. The allegation relates to the precise time of the *factum* of the deeds, which was the 16th October, 1821. It is not pretended that any judgments were *then* recovered; the memoranda shows that judgments were *afterwards* recovered. The question is, what is alleged *in the bill*; and it can hardly be conceived that the exhibit was adduced to show a subsequent *fact*, which occurred at a period long subsequent to the time to which the allegation relates. It would be substituting *evidence* in the place of *pleading*. Can it be seriously argued that the pleader foresaw the necessity of averring the recovery of judgments; and adduced exhibit No. 2, for that purpose? more especially as the averment would be *felo de se* in regard to one of the complainants; for the exhibit shows that *Holtz* never recovered judgment; his suit abated. But the averments are conjoint; and it is not to be supposed that the pleader, to obviate the objection now urged, meant to aver the recovery of judgment by *one* complainant; and the non-recovery of the *other*; and to make the contrariant averments, by precisely the same



words. He cited the following authorities, as to the certainty which is required in pleadings in chancery. 1 *Vern.* 483. *Dick.* 362. 2 *Ves. jr.* 318. 1 *Ves. jr.* 51, 287. 9 *Ves.* 77. 5 *Conn. Rep.* 352, 592. 6 *Conn.* 37. 7 *Conn.* 342, 496.

It was admitted by the counsel below, as it appears from an agreement in the record, that these exhibits, although short copies, should be considered as full transcripts. It may, therefore be urged, that the *fact* of the recovery of judgment, by one of the complainants, does appear in the cause. Such is not the agreement. The agreement, as I understand it, is, that the short copies shall be considered as full transcripts. And as the short copies were adduced to uphold the allegation of *the pendency of suits*, the transcripts can avail only to perform the same office. It is not *a fact* in the cause, proved or admitted under the commission. But if such were the case, the fact could not be noticed. It is a well settled rule, that no evidence will be noticed as to any matters not alleged in the pleadings. *Clarke vs. Turton*, 11 *Ves.* 240. *Gordon vs. Gordon*, 3 *Swanst.* 472. *Williams vs. Llewellyn*, 2 *Y. and J.* 68. *Hall vs. Mattley*, 6 *Price*, 240. *James vs. McKernon*, 6 *Johns. Rep.* 565. *Hoye vs. Brewer*, 3 *Gill and Johns.* 153. *Chambers vs. Chalmers*, 4 *Gill and Johns.* 420. *Hayward vs. Carroll*, 4 *Harr. and Johns.* 518.

4. There is yet another preliminary question of some interest. The bill shows that the grantor had departed this life. Whether administration was ever had upon his personal estate or not, is not shown by the bill. No administrator is brought before the court, nor is any reason assigned for the omission. Ought not the personal representative, if any, to have been a party?

(1.) As to the deed for the personal property. It is very true, the personal representative, if any, would have no right to the personal property. *Dorsey vs. Smithson*, 6 *Harr. and Johns.* 61. The grantees would be liable, as executors *de son tort*, if the deed be fraudulent, and may

be sued in a court of law. *Dorsey vs. Smithson*, *ut sup.* *Farley vs. Farley*, 1 *McCord's Ch.* 516. In the case of *Chamberlayne vs. Temple*, 2 *Rand.* 397, it is said that a suit at law against them, as executors *de son tort*, is not necessary; but even that case determines, that the property is only liable in the hands of the donees, in default of assets in the hands of the rightful representative, and that the executor or administrator is a necessary party. *Vide also Se-reur vs. Bostick*, 2 *McCord's Ch.* 416. *Bradford vs. Fel-der*, 2 *McCord's Ch.* 169. 2 *Hov. on Frauds*, 75.

(2.) As to the deed for the real property. Land in this State is only liable in aid of the personalty, and as auxiliary assets for the payment of debts. *Wyse, et al. vs. Smith and Buchanan*, 4 *Gill and Johns.* 295. In the case of *Fordham vs. Rolf*, 1 *Tam.* 1, (abridged in 2 *Chitty's Dig.* 1491.) it was held, that in a creditor's suit for the sale of land, *where there was no personalty*, and the executor refused to prove the will, that administration with the will annexed must be, nevertheless, obtained in order to show a deficiency of assets.

It was admitted, under the commission, that no administration had been obtained on the grantor's estate. Even if this fact had been set forth, by way of excuse in the bill, it could not avail, if the authorities referred to be correct. But it is not put in issue by the pleadings, and cannot therefore be noticed. Even if a title to relief were made out in evidence, it is a good objection that the bill is not adapted to the case made. The court can only decree *secundum allegata et probata*.

[The counsel here proceeded to discuss the various questions of fact and law, upon the merits; and went at large into the examination of the proof. In the course of his argument, he asserted the following propositions.]

1. The relationship between the parties is not an *indici-um* of fraud. It may be a ground on which to base a suspicion; it may strengthen a presumption; but it will not, independently, generate such presumption. In the *Scotch*

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law, transactions between parties conjunct are, on that isolated ground, deemed open to suspicion; but even by that law, they do not presume fraud *ab ante*. The presumption must be raised by something *aliunde*; mere affinity or consanguinity without more, is not sufficient.

2. The deed for the personal property was clearly *bona fide*. The consideration expressed was the full and uncontradicted value of the property. It was fully paid. The possession of the property was changed without trust; for the evidence, as to a secret trust, whatever be its effect, does not apply to *this* deed. The party had a right to prefer these creditors; and that was unquestionably his intention. Such a deed is good at common law. *Twyne's Case*, 3 Co. 81. Our acts of Assembly, in relation to insolvents, cannot apply, as the grantor never became a petitioner. *Owing and Cheston vs. Nicholson and Williams*, 4 Harr. and Johns. 107. *Harding vs. Stevenson*, 6 Harr. and Johns. 266. Besides, it is not alleged or proved, that it was made with *intent* to become a petitioner. *Kennedy vs. Boggs*, 5 Harr. and Johns. 411. The pendency of the suit is only a badge of fraud, and not in itself constructive fraud. Its only effect is to put the consideration, in question. *Rob. on Fraud. Con.* 577. But a conveyance by a debtor to one creditor, pending a suit by another, in payment of the former's debt is good. *Rob. on Fraud. Con.* 436. *Twyne's Ca.* 3 Co. 81. *Will vs. Franklin*, 1 Binn. 502.

3. The deed for the real property is impeached in general terms, as made with intent to delay, hinder and defraud the grantor's creditors. The bill contains no specific allegations of fraud. From the scope of the interrogatories, however, it would seem that it was supposed, that the consideration was merely feigned, and the deed voluntary. The bill does not charge that the expressed consideration was *inadequate*; nor is there any charge of the existence of a *trust*. The complainants, however, have offered proof as to the *value* of the estate; and they have endeavored to



prove a *trust* in the grantee, for the payment of debts generally. He contended, upon the proof, that the consideration expressed in the deed was the full value of the estate, subject, as it was in part, to a heavy mortgage. The consideration was fully paid, partly by the surrender of valid claims against the grantor, partly by the grantee's own notes. The fact that some of the claims were not then due, is no *indicium* of fraud under the statute of *Elizabeth*. It would be material under the bankrupt laws of *England*. *Thompson vs. Freeman*, 1 Term. Rep. 156. *Hartshorn vs. Slodden*, 2 Boss. and Pull. 583. *Phœnix vs. Ingraham*, 5 Johns. Rep. 428. It would be strong evidence of an intent to give a preference under our insolvent laws; but they are not in question now. Apart from the bankrupt laws and the insolvent laws, a debtor, unsolicited and unpressed may, *ex mero motu*, give such preference, and the note, although not due, is a valuable consideration. *Vide* the argument of *Heath, Chambre and Rooke*, justices, in the above cited case of *Hartshorn vs. Slodden*. Besides this, the grantees were sureties for the grantor in all these immature notes; and an engagement by a surety is, in itself, a valuable consideration. *Stevens vs. Bell*, 6 Mass. Rep. 342. *Howe vs. Ward*, 4 Green. 199. *Crosby vs. Crouch*, 11 East. 256. The fact, that the consideration was in part made up of the grantee's own notes, is no argument of fraud. A bond or other security, by a purchaser, is a valuable consideration. *Seward vs. Jackson*, 8 Cow. 432, 454.

4. But if the price was inadequate, that will not, *per se* invalidate the deed. It may avail as evidence of fraud; but then the inadequacy must be gross; so gross as to shock the conscience. *Copis vs. Middleton*, 2 Madd. Rep. 232. *Watkins vs. Stockett*, 6 Harr. and Johns. 435.

5. Whether the deed be fraudulent or *bona fide*, is a question of law upon the facts. It is the judgment of law upon facts and intents, when these are ascertained. *Sturtevant & Keep vs. Ballard*, 9 Johns. Rep. 337. *Jackson vs. Matter*, 7 Cow. 301. He contended, that the transaction



was *bona fide* in fact: and not constructively fraudulent from any of the attendant circumstances, as disclosed in the evidence.

6. The subsequent declaration of a grantor cannot be heard to impugn his own deed. *Nemo allegans suam turpitudinem est audiendus*. He could not be called as a witness; although the grantee, in that case, would have the benefit of cross examination. *Hearn vs. Soper*, 6 Harr. and Johns. Rep. 281. *Conolly vs. Howe*, 5 Ves. 700. *Chess vs. Chess*, 1 Penn. Rep. 38. In *Merrill vs. Meachen*, 5 Day 341, evidence was received of a grantors declarations as part of the *res gestæ*; and its admissibility is expressly put on that ground. So in *Kolb vs. Whitely*, 3 Gill and Johns. 195, the declarations of the insolvent were admitted as part of the *res gestæ*; and the court below restricted the admission of declarations to such as were antecedent to the transaction. So in the case of the *United States vs. Gooding*, 12 Wheat. 468, the acts and declarations were received as part of the *res gestæ*; and a fraudulent combination was first established. He also cited on this point, *Apthorp vs. Comstock*, 2 Paige, 488. *Wilbur vs. Strickland*, 1 Rawle. 458. *Retenbach vs. Retenbach*, 1 Rawle. 362. *Beach vs. Catlin*, 4 Day, 292.

7. But if the grantor's declarations be received, they would not establish fraud. The intention to keep the property out of the sheriff's hands would not be fraudulent, without more. The object of the deed was, manifestly, to secure the grantees, in preference to other creditors; its necessary operation, therefore, and its direct object, was to disappoint other creditors. Some were pressing their claims to judgment, in order to get a preference and seize the property: he chose to give a preference to these grantees. Could he have done this, if he had waited until after the seizure by the sheriff? He cited *Meux qui tam vs. Howell*, 4 East. 1. *Wilt vs. Franklin*, 1 Binney 521. So the declaration of the grantor, that his sons were to go on and sell his property and pay his debts is immaterial in this case.

There is no allegation of such a trust, and the testimony is inapplicable: but if such proof can be noticed, it would not bring this deed within the statute of *Elizabeth*. The questions put by the judges to the counsel, in argument, in *Meux qui tam vs. Howell*, 4 *East*. 9, are decisive of their opinions on this very point. It might superinduce upon the grantees the responsibilities of a trust for the benefit of creditors, in a proceeding adapted to such a case. But the object of this bill is not to enforce this *trust*; but to vacate the deed, as fraudulent within the statute. The case of *Naylor vs. Fosdick*, 4 *Day*, 146, is very different. The complainants cannot now abandon their ground, and seek to *uphold* the deed, and engraft upon it a *secret trust*, when the scope of the bill was to *vacate* it. A bill for one purpose cannot be made to answer another and different purpose.

DORSEY, J., delivered the opinion of the court.

Of the fraudulent character of the conveyances in question, on taking a full survey of all the facts and circumstances of this case, and drawing such inferences as a jury might reasonably make, we entertain no doubt. In deciding in favor of the appellants the various questions of law, presented by the able and ingenious argument on the part of the appellees, we cannot but admit, that some of our conclusions have been adopted, not without difficulty and hesitation.

It was insisted in behalf of the appellees, the conceding the appellant's right to relief, upon the ground of the invalidity of the deeds, under the statute of *Elizabeth*, yet that the decree of the county court denying such relief, could not be reserved, on account of various defects in the proceedings of the appellants, by which it was sought; and first, that the bill of complaint was filed in the name of two creditors; whereas, all of them, or one only, should have been made a party complainant. This is a mere formal objection, not taken in the court below. If it had been, it might, (if sustainable) have been removed by amending the

bill. The appellees admit that one creditor may sue alone. Then why may not two? Rules of pleading in equity are not governed by the same technicality as to matters of form, that controls proceedings at law. Courts of equity look to substance, not form. The distinction then, (if it exist at all, which we cannot admit,) is a mere matter of form; nothing in reason or substance can be urged in its support. If one of many creditors proceed, and be successful, the fund is retained in chancery until all the creditors are notified to come in, and assert their claims. The same practice prevails on like proceeding by two.

Secondly, it is alleged, that it is not stated in the bill, according to the usual form, that the complainants proceed on behalf of themselves and other creditors.

This objection we think fully answered, and the requisition, if it exist, substantially gratified, by the prayer in the bill, that the property be sold for the benefit of the creditors of *Jacob Staley*.

The third defect suggested, is, that the bill does not show or allege, that the complainants were creditors at the time of filing their bill; but only at *Jacob Staley's* death. If it were conceded, that this fault would have been fatal on demurrer, it cannot avail the appellees, as the question now arises before the court. The strong, if not necessary implication of the existence of the complainant's claims, at the time of the filing of their bill, clearly arises from the facts therein set forth; but that implication is made irresistible by the answer of the appellees, who admit, that the notes, single bills, and bonds exhibited, show the "true amount of the debts due from *Jacob Staley deceased*, to the complainants.

The fourth defect relied on, is, that the complainants stand before the court, as simple contract creditors only; whereas, to entitle themselves to the relief prayed for, they should have set forth in their bill, the judgments to bind the land, and *fi fa's* to bind the personal property. In sustaining the appellants in the teeth of this objection, we do not



mean to shake the general principle, that where a creditor seeks the aid of a court of equity, to pursue property fraudulently conveyed away, a judgment must first be obtained against the debtor, before his lands fraudulently granted can be reached; nor that in such a pursuit of personal property, a *fiери facias* also must first have issued. In examining the authorities referred to by the appellees, to sustain their position, chancellor *Kent*, in reference to personal property says, in *Hendricks vs. Robinson*, 2 *Johns. Ch. R.* 296, “the preliminary step which seems to be required, is, that the judgment creditor should have made an experiment at law, and bound the property by actually suing out execution;” and in *Brinkerhoff vs. Brown*, 4 *Johns. Ch. R.* 677, “if he seeks aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in relation to personal estate, he must show an execution giving him a legal preference, or liens upon the chattels.” And in *Shirly vs. Watts*, 3 *Atk.* 200, a judgment creditor who had not taken out execution, having brought a bill to redeem against the mortgage of leasehold interest, *Lord Hardwick* decreed, that “the bill must be dismissed, because till execution, the plaintiff has no lien on the leasehold estate.” If then the creditors’ claims to relief rest upon their liens thus to be acquired, (a position not entirely free from doubt) it follows as a necessary consequence, that out of the fund pursued, if land, they must be paid according to the seniority of their judgments: if personal property, according to their respective priorities, acquired by the delivery of their several *fi fa’s* to the sheriff. Would it for a moment contend, that a court of equity in *Maryland*, in the distribution of funds brought within its jurisdiction, by a proceeding of such a character as the present, would sanction any priorities asserted in virtue of judgment, rendered against his personal representative, after the death of the fraudulent grantor? We think not. All creditors without judgments in the life time of the fraudulent grantor, would come in *pari passu*. No subsequent judgment would cre-



ate any lien. The frequent decisions of the courts of this State have long since settled, so as to preclude all debate on the subject, that a judgment against an executor or administrator, not only does not *bind* real assets, but that it is not even *prima facie* evidence of a debt, where the real estate of a deceased debtor has been sold for the payment of all debts against him. Of what possible avail then, would the required judgment against the executor or administrator of *Jacob Staley* be, to charge the real estate in question? It has not been intimated that any judgment should be shewn against the heirs of the deceased. Indeed, having no assets by descent, such a judgment could not be obtained against them.

But suppose we are wrong in this view of the subject; and that the inefficacy of the judgment as a lien does not of itself dispense with the necessity for its existence; still we are of opinion, that the objection, as now presented to us, ought not to be sustained. It is raised for the first time, as far as the record informs us, in the appellate court, after the parties have incurred great expense, and consumed much time, in litigating their rights upon the merits of the controversy. Had it been relied on in court below, either by demurrer, a plea in bar, or as a substantive ground of defence in the answer, it could have been easily obviated. As now presented, it works gross injustice, and is a complete surprize on the complainants. It becomes this court therefore, to listen to it with a reluctant ear, and to be even astute in the discovery and combination of the facts in the cause, that the unjust operation of this unseasonable objection may be frustrated; and we feel ourselves warranted by the pleadings and circumstance of this case, in drawing such inferences of fact as enable us to surmount this difficulty. It is not a defence set up in the answer. It forms no part of the issues in the case. The complainants were not called on to account for the omission. If the deceased left no assets, the natural presumption is, that no letters of administration would have been taken out on his

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estate; that had he left such assets, letters would have been granted; and the fair inference in that event is, that the appellees in one of the three usual modes in which their object could have been effected, would have required that the administrator might be brought before the court, and be made to apply the effects in his hands to the satisfaction of the complainants' debt; thus extinguishing their right to prosecute any claim against the property conveyed. Not having done so, at this stage of the cause, the just conclusion is, that no administration was ever granted on the deceased's estate, because he left none; and this conclusion is rendered in the highest degree probable, if not irresistible, when we advert to the facts, which we assume as established by the record; that *Jacob Staley*, at an advanced age, to hinder and defraud his creditors, about five months before his decease, had conveyed away all his property, both real and personal, and from the time of such conveyance until the day of his death, lived as a dependent with one of the fraudulent grantees; and was admitted by all parties to have been insolvent at the time of his death. Weighing all these facts and circumstances in connexion, and adverting to the time at which this question has been agitated, we deem ourselves justified in inferring, that there exists no personal representative of the deceased, against whom a judgment could have been recovered; or to answer another objection raised by the appellees, who ought to have been before the court as a party to these proceedings.

But, say the appellees, even although it were proved that there were no assets, the complainants were bound to have taken out letters themselves, in order that proper parties might have been before the court, and the necessary preliminary judgments obtained. Would that have been accomplished by their administering? Could they sue and recover judgments at law, or file bills in a court of equity against themselves? Nay, would they not have been obliged to adopt the same course of proceeding, and established their claims in the very same way, if they had administered,

which they are now prosecuting without such administration. Where then the advantage or necessity of this unimportant, superfluous issue of letters of administration.

The foregoing views of this case, render it unnecessary for us to consider the point so much controverted in the argument, whether the complainants' exhibit No. 2, is any further to be regarded as a part of the bill, than to show the precedence of the suits, of which it was referred to as the proof.

The bill having charged that by the deeds complained of, *Jacob Staley* had conveyed to the appellees all his real and personal estate, and their answer having denied that fact, and averred that after the delivery of the deed to them, he "was seized and possessed of real estate, both in *Frederick* and *Montgomery* counties, abundantly sufficient" as they believed, to pay the claims of the complainants in this behalf," it was insisted that the defence is sufficiently established by the answer, and is a bar to the relief which has been sought by the bill. To this doctrine we cannot accede. The fact of *Jacob Staley's* owning other real estate in *Frederick* and *Montgomery* counties, is a matter put in issue by the appellants; and being an affirmative allegation, the *onus probandi* rests upon the appellees. Aware of this, they have attempted to prove it, but by testimony inadequate to the object. The mere production of deeds of conveyance, unaccompanied by any proof of the existence of the property conveyed, and the title of the grantor thereto, or his possession thereof, or the possession thereof by the grantee, is wholly insufficient for that purpose. In *Sands vs. Hildreth*, 14 *Johns. Rep.* 499, *SPENCER, J.*, says, "it has been argued, that *Sands* (the grantor) might have had property abundantly sufficient to satisfy his creditors, independently of the lands sold to the respondent. This however is not proved, and if it were true, the appellant was bound to make out the fact. Not having done so, the inevitable conclusion is, that *Sands* had no other property, out of which his creditors could obtain satisfaction."



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But suppose the allegation as to real property be true, it forms no barrier to a decree in favor of the appellants. To be so, it should have alleged not merely a sufficiency of other estate to pay the claims of the complainants, but all the debts due by *Jacob Staley*.

It has been attempted to support the deed in question, on the ground, that being executed with a view to a sale for the payment of the debts of all the creditors, it stands untainted by fraud. If such were the object of the instrument, it should have formed a part of its contents, or been elsewhere reduced to writing. Being upon its face, an absolute deed of bargain and sale, and being proved not to have been a *bona fide* conveyance, as such, it is covinous and fraudulent as against the complainants, and in violation of the statute of *Elizabeth*; nor can it be bolstered up by the fact of there having been a secret oral contract between the grantor and grantees, that the property conveyed should be held in trust, and sold for the benefit of the creditors of the grantor. The answer set up no such defence. Nor can it be supported on that ground, even if in a proper state of the pleadings, it might be so relied on. The necessary tendency of such a transaction is covinous and fraudulent, so far as the pursuing creditors are concerned. A secret contract so made could not be enforced, either at law or in equity, at the suit of the grantor or his creditors. The deed was executed according to the intention of the contracting parties; no mistake or surprise in obtaining it; nor was any fraud, duress, or imposition practised upon the bargainor. The secret agreement is a nullity under the statute of frauds, and there is no head of equity jurisdiction, under which relief could be successfully sought, on such a contract. A court of chancery should therefore stamp on it the mark of reprobation.

The effort which was made for the rejection of the testimony of *Joseph Miller*, on the ground of its being given in answer to a leading interrogatory, is wholly without foundation, as all the material facts to which he deposed, were



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elicited by interrogatories which stand free from all exception.

DECREE REVERSED, and a decree was passed by this court for a sale of the property in the proceedings mentioned.

BUCHANAN, Ch. J., dissented.

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REVAND KEARNEY vs. PETER GOUGH, *et ux.*—Dec. 1833.

It is our settled practice, to give the plaintiff on the record the opening and conclusion of the argument to the jury, except in cases of avowry for rent in arrear, in relation to which the practice is not uniform.

Where the defendant in his plea of justification, to a declaration charging him with a libel, introduced certain passages from a pamphlet written by the plaintiff, upon which plea issue was joined; this is not so far an adoption of the whole pamphlet as true, as to enable the plaintiff to read *other* passages in it, for the purpose of showing that the defendant was the aggressor in the controversy, which led to its publication.

APPEAL from *St. Mary's County Court*.

On the 27th of August, 1828, the appellees instituted the present action against the appellant, for a libel on the plaintiff's wife.

The defendant pleaded a justification as to part, and not guilty as to the residue of the words laid in the declaration.

In the first plea, certain passages of a pamphlet written by the appellee, *Peter Gough*, are introduced, and relied upon by the defendant, as a justification of the actionable language imputed to him. Issue was joined upon both pleas.

1. At the trial the defendant contended, that in as much as he had justified the language charged to him in the declaration, the affirmative of the issue was upon him, and that he had a right to open and close the argument before the jury. But the court (KEY, A. J.) refused the application, and the defendant excepted.

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2. The plaintiff then offered to read, from the printed pamphlet referred to and made a part of the defendant's first plea, various paragraphs in the said pamphlet, as the thirty-nine articles of accusation, made by the defendant against the plaintiffs, before the publication of the said pamphlet, as evidence that the defendant had written the said thirty-nine articles, and sent them to the plaintiff, *Peter Gough*, and that consequently the defendant was the aggressor in the controversies, which had led to the publication of that pamphlet. To the reading of which thirty-nine articles for that purpose, the defendant objected, and insisted that the plaintiff had no right to read said pamphlet, or any part thereof, except for the purpose of explaining his, the plaintiff's meaning and intention, by such parts of said pamphlet as contained abusive, and defamatory words in application to the defendant. But the court (STEPHEN, Ch. J., and KEY, A. J.) was of opinion, that by the introduction of the said pamphlet into the defendant's plea, the whole pamphlet was in evidence before the jury, and that the plaintiffs had a right to read the said thirty-nine articles, for the purpose aforesaid. The defendant excepted, and the verdict and judgment being against him, he brought the record upon appeal before this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and DORSEY, J.

*A. C. Magruder* for the appellant, contended,

1. The first plea did not authorise the plaintiffs reading the pamphlet written by one of them. It does not appear that the defendant attempted to support said plea, or offered any proof touching said pamphlet, alleged to have been written by plaintiff.

2. It does not appear, that any attempt was made by the defendant to prove the plaintiff the aggressor.

3. But if the defendant had offered it (the pamphlet) in evidence, the plaintiff's own pamphlet is not evidence, that the defendant had said or done any thing.

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*V. H. Dorsey*, for the appellees.

1. According to the established practice in the *Maryland* courts, the plaintiff on the record has the right to open and conclude the argument; and the rule is a very convenient one, as it dispenses with many troublesome inquiries. If however, it cannot be considered as settled, it is at all events, a matter resting in the discretion of the courts, and of course is not the subject of review on appeal. *Hawkins vs. Jackson*, 6 *Harr. and Johns*. 151, note (a.)

2. By introducing a part of the plaintiff's pamphlet in the plea, the whole was made evidence. *Roscoe's Ev.* 32. *Bul. N. P.* 138, 298. *Jackson vs. Stetson*, 15 *Mass.* 48. 7 *Cow. Ev.* 633.

BUCHANAN, Ch. J., delivered the opinion of the court.

We concur in opinion with the court below, on the first exception.

The decision is in conformity with the settled practice throughout the State, giving to the plaintiff on the record, the opening and conclusion, except in cases of avowry for rent in arrear; in relation to which the practice is not uniform. But we dissent on the second exception.

THE JUDGMENT IS THEREFORE REVERSED AND PROCEEDENDO AWARDED.

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ELEANOR DOUGHERTY, *et al.* vs. ISAAC MONETT'S LESSEE.  
*December, 1833.*

A devise in 1796, that "my son F shall have all the land I have any right, title, or claim to, either by law or equity, except the house and lot, and two acres adjoining," which the testator, by a previous clause in his will, had devised in fee to his six daughters—only passes a life estate to F.

APPEAL from *Calvert County Court*.

The appellee, who is one of the heirs at law of *Francis Williams* the testator, brought the present *Ejectment* against

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the appellants, who claim under *Francis Williams*, the devisee, on the 6th of October, 1828. The will which was executed in May, and proved in June, 1796, contained the following clauses.

“Item, I give, and bequeath to my six daughters, (naming them) the house and lot I now keep tavern in, and two acres of land, the most convenient, adjoining the aforesaid house and lot, to them, and their heirs forever.”

“Item, my will and desire is, that my son *Francis Williams*, shall have all the land I have any right, title, or claim to, either by law or equity, except the house and lot, and two acres adjoining, I have heretofore given my six daughters.”

The prayer of the appellant for an instruction to the jury, that *Francis Williams* the devisee, took an estate in fee under this devise, and that the verdict must be for the the defendants, was refused by the court, [KILGOUR, and WILKINSON, A. J. sitting] and the verdict and judgment being for the plaintiff, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

*Gill* for the appellants, contended, that the devise carried the fee to *Francis Williams*.

The testator evidently intended to dispose of his whole estate, and the word *land* as used in this will, is equivalent to the word *estate*. If the intention is apparent, express words of limitation need not be used. *Beall vs. Holmes*, 6 *Harr. and Johns*. 207, 209.

No counsel argued for the appellee.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case turns upon the construction of a clause in the will of *Francis Williams*, made on the 21st of May, 1796, which is in these words. “Item, my will and desire is,



that my son *Francis Williams* shall have all the lands I have any right, title, or claim to, either by law or equity, except the house and lot, and two acres adjoining, I have heretofore given my six daughters and *Elizabeth Robbins*."

The house and lot, and two acres adjoining, were devised to his six daughters in fee simple; and the question presented, is shortly this; whether *Francis Williams* took an estate in fee simple, or for life only, in the lands devised to him.

The rule, "that express words of limitation, or words tantamount, are necessary in a devise to pass an estate of inheritance," is too well settled to be now drawn in question. The argument offered in support of the pretension of the appellants, (who claim under *Francis Williams* the devisee) that he took an estate in fee simple, is drawn from the supposed intention of the testator; which it is said, is to be collected from the circumstance, that the preceding devise of the house and lot, and two acres adjoining, to his six daughters is in fee simple, and that the devise to *Francis*, is of all his lands, except what is devised to his six daughters. But if the devise of the house and lot, and two acres adjoining, to his six daughters, "and their heirs forever," prove any thing, it is directly the reverse of what is supposed; since it shows, that when the testator intended to give a fee, he knew what words were necessary to create one.

It is true, that in the construction of a will, the intention expressed by the testator to be collected from the whole instrument, if consistent with the rules of law, and there be apt words used to effectuate that intention, shall prevail. The word *heirs* need not be used, to create an estate in fee, nor any technical terms, or any particular form of words; but any words, sufficiently showing the intention of the testator to dispose of his whole interest in the thing devised, will have the same effect, as a devise to one *in fee simple*, or *forever*; or any other words having the same import.

But no such words are to be found in this will; and if it was the intention of the testator to have given an estate in fee simple, to the devisee *Francis Williams*, as it probably was, (and perhaps commonly is, in general devises without words of limitation) he has not used apt words in the devise to him, to effectuate that intention. There are not only no express words of limitation in that devise, but none that sufficiently show the intention of the testator, to give to the devisee the whole of his interest in the land devised. It is the common case, of a general devise of land, without any words of limitation, and cannot be aided by the preceding devise in fee, of another portion of the testator's estate to his six daughters, and is not so strong a case as that of *Beall vs. Holmes*, 6 *Harr. and Johns*. 205, decided by this court, in which the whole doctrine is gone into, and the authorities fully examined. In that case, there were introductory words to the will, showing the intention of the testator to have been, to dispose of the whole of his estate; but the devise itself was a naked, general, devise of a tract of land, with no words of limitation, or other words added, which was held not to be aided by the introductory clause.

To this will there is no such introductory clause; and no argument can be drawn (nor has it been attempted) from the words, "I have any right, title, or claim to, either by law or equity."

The devise is not, of all the testator's right, title, or claim, to the lands, but of *all the lands* to which he had any right, title, or claim. The latter words being used, as descriptive of the thing intended to be given, and not as denoting, the *quantum* of the testator's interest in the lands devised; and mean no more, and can have no other effect, than if he had said *all my lands*.

We concur therefore in opinion with the county court.

JUDGMENT AFFIRMED.

CHARLES D. W. JOHNSON vs. JOHN CLENDENIN AND  
SAMUEL WAY.—*December, 1833.*

The object and design of the writ of *ne exeat regno*, as used by courts of chancery, is to hold the party amenable to justice, and to render him personally responsible for the performance of their orders and decrees.

The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law; they undertake that the defendant shall be personally responsible for the performance of the orders and decrees of the court.

Where the defendant in the writ of *ne exeat* has been proceeded against and committed to jail for not complying with a final decree of the court in the cause, and afterwards escapes from custody, his securities upon the *ne exeat* bond are not responsible, and the court as respects them may order the bond to be cancelled.

APPEAL from the equity side of *Harford* county court.

The appellees on the 17th August, 1829, became sureties for a certain *Nathan Walton*, in a *ne exeat* bond in the penalty of \$6000, conditioned, "that the said *Walton* shall not go, or attempt to go, or depart from the State of *Maryland*, without the leave of the *Harford* county court, for that purpose obtained."

A final decree was subsequently made in the cause, in which the *ne exeat* issued, ordering *Walton* to bring into court the sum of \$5540; upon the bringing in of which sum, the decree directed that the writ of *ne exeat* aforesaid be dissolved.

This decree not being complied with, an attachment issued at the instance of the appellant, (who was the complainant in the case against *Walton*,) to compel the performance of the decree. Upon this attachment *Walton* was taken and duly committed to prison, from which he effected his escape. Afterwards, upon the application of the complainant, a writ of *sequestration* issued, under which the property and effects of *Walton* were taken. In this state of the case, the appellants filed their petition, praying that the *ne exeat* bond might be cancelled as to them; and an order

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to that effect having been passed by ARCHER, Ch. J., the appellant brought the record by appeal to this court.

The case was submitted on written arguments to BUCHANAN, Ch. J., and MARTIN, STEPHEN, and DORSEY, J.

*Otho Scott* for the appellant.

The appellant contends, that the committing of *Walton* under the attachment to bring the money into court, did not *per se* discharge the sureties in the *ne exeat* bond, and that although the court, upon application, might have discharged them while *Walton* was in custody, it could not be done after he had escaped from prison. The order of the court in this case directs, that the *ne exeat* be discharged upon the bringing in of the money, which implies, that it is not discharged till that is done. The being in custody for the contempt in not obeying the order is not equivalent to complying with it. The imprisonment of the party is no satisfaction of the order. Even while he remains in custody a sequestration will issue, which could not issue if the imprisonment was regarded as satisfaction. See *Hind's Ch. Pr.* 129, citing 1 *Ch. Rep.* 152. Nor is the being in custody on a *ca sa*. if the party escapes, considered as satisfaction of the judgment. *Ford, terretenant of Preston vs. Gwinn's Admr.* 3 *Harr. and Johns.* 496.

The condition of the bond is, that the party *shall not depart from the State without the leave of the court*. He has left the State, and without the leave of the court, has broken the condition, and given the plaintiff a right of action against his sureties before any application was made to be discharged.

There are two authorities where the court refused to discharge the sureties upon application, where the defendant was in actual custody under process in the suit. See *Le Clea vs. Trot. Prec. in Ch.* 230, and *Stapylton vs. Peill*, 19 *Ves.* 615.



In *Debazin vs. Debazin*, 1 *Dick.* 95, a similar application was granted. It would seem that this case was overruled by the case in *Vesey*. But suppose it is not, it is very distinguishable from the case under consideration at the time of the application; in that case the party was in actual custody, and had not left the kingdom; in this case the party is not in custody, but has departed from the State. The court might reasonably discharge the sureties, when their principal was in custody under their process, when they would not do so, if he had escaped and fled from the State.

There is no analogy between sureties in a *ne exeat* bond, such as is given in this case, and special bail. The latter are considered technically the jailors of their principal, and may arrest him at any time and surrender him. The condition of their undertaking is complied with, if the *principal renders himself upon a ca sa*. There is no such condition in the *ne exeat* bond, it is, *he shall not depart, &c.*

The form of the condition has some influence, as will be seen by reference to the different relations in which bail to the sheriff stand to their principal, to that of special bail. The condition of bail to the sheriff is, that the principal shall appear.

Bail to the sheriff cannot surrender their principal, and if he is even imprisoned it does not discharge the bail. *Hamilton vs. Wilson*, 1 *East.* 390. 1 *Tidd's Pr.* 252.

The proceedings against *Walton's* property after his escape could not release his sureties, no injury was done to them by it; on the contrary they were benefitted, as all that could be made out of the property would go to diminish their responsibility on the amount of it.

It is doubtful, whether for the escape an action could be maintained against the sheriff. It is not a committal upon final execution, and so a constructive satisfaction as regards the principal debtor, if he had not escaped.

*Constable*, for the appellees.

The inquiry is, whether the court below erred in ordering the *ne exeat* bond to be cancelled, *as to the appellees who signed it as sureties*. This will depend upon the true character and extent of liability incurred by sureties in a *ne exeat* bond; and as preliminary to the consideration of that question, we will briefly examine the *objects* of the writ of *ne exeat*, and the *purposes* for which the bond is required.

The writ of *ne exeat regno* has always been regarded in *England* as part of the royal prerogative intended for political purposes, but the principles on which its exercise by the *British* government has been defended, are unsuited to the enjoyment of rational freedom, and ought to be repudiated as odious dogmas, destructive of the unquestionable national right of every man to seek happiness, by *bona fide* change of domicile, in whatever country he can find it. In this country, the writ of *ne exeat* is a "writ of right," and was so held in *Gibert vs. Colt*, 1 *Hopkins*, 500. And in *England*, it is now universally considered as a remedial process of the civil law, to which the suitor is entitled, upon presenting a case within the settled principles governing that branch of chancery jurisdiction. *Beames' Ne Exeat*, 21. 1 *Vesey and Bea.* 129. Sir Samuel Romilly arguing, 19 *Vesey*, 312. In the case of *Porter vs. Spencer*, 2 *J. C. R.* 172, Chancellor *Kent* remarks, that "he has no discretion or option to refuse the writ, when a case is brought within the established rules of the court.

The former rules which prevailed on this subject, that a debt to authorize the issuing of this writ, must be purely equitable, for the recovery of which no action could be maintained in a court of law, *Bea. Ne Exeat*, 29, 33, and that the affidavit must state positively the precise sum due, *Ib.* 32, have been modified, and changed by the course of modern decisions; and it is now well settled, that if the party has not made his election, by instituting proceedings in a court of law, this writ may properly issue

upon an affidavit stating the plaintiff's belief as to a balance due him, and whether the subject matter be of a character over which the court of chancery exercises an *exclusive* or *concurrent* jurisdiction. 8 *Vesey*, 593, 8. 11 *Ib.* 55. 15 *Ib.* 444. 16 *Ib.* 470. 1 *J. C. R.* 1. 2 *Ib.* 169. 6 *Ib.* 138. 7 *Ib.* 189. And the better opinion seems to be, that the writ may issue though the demand be not liquidated. *Denton vs. Denton*, 1 *J. C. R.* 364. In the case of the *Attorney General vs. Mucklow*, 1 *Price's Exc. Rep.* 289. The court of exchequer, conformable to their practice of making orders in the nature of the writ of *ne exeat*, passed an order directing the sum in which security should be given, although no amount was stated in the affidavit. And the *American* annotator, upon *Beames' Treatise* on the writ of *ne exeat*, 32, remarks, that "the good sense and equity which guided these decisions, are believed to be worthy of general application."

From recurring to the general principles which govern the court of chancery in granting the writ of *ne exeat*, it is obvious that the proceeding is analogous to the taking of bail at law. I shall therefore attempt to maintain, that the process of *ne exeat* issues for the purpose of compelling the party to give "equitable bail." And that the bond exacted by the sheriff in executing the writ, is in the nature of a *bail bond*.

In support of this position, I shall not rely on any isolated adjudication, but refer to the uniform language and opinions held upon the subject by the most eminent *English* chancellors. In *Exparte Bruncker*, 3 *Pere W.* 312. *Ld. Talbot*, in discharging a writ of *ne exeat*, upon the ground that the defendant had been arrested at law, remarks, that the plaintiff "ought not to have double bail." In *Russell vs. Asby*, 5 *Ves.* 97. *Ld. Rosslyn* says, "upon application for this writ no *subpœna* is taken out, but upon personal service of the writ, the defendant is bound to appear. He must come into court and appear, for he is to *give bail*." In *Jones vs. Sampson*, 8 *Ves.* 593, the defendant had been arrested at

law, and *Ld. Eldon* said, he must “impose terms upon the defendant, that the bail at law should stand, or he should come under a writ of *ne exeat*.” And in the case of *Am-sinck vs. Barklay*, *Ib.* 594, 7, *Ld. Eldon*, after mentioning the opinion of *Ld. King*, that if the party has bail, he shall not have this writ, said, that as the defendant had been twice held to bail at law, the writ must be discharged; and the decision is based on the rule of law, that a person shall not be arrested, and held to bail a second time upon the same cause of action, and although the plaintiff urged that the suits had been discontinued for the want of jurisdiction, still the chancellor said, “you cannot after an arrest at law, make the defendant give *equitable bail*.” In *Jackson vs. Petrie*, 10 *Ves.* 164, *Ld. Eldon* said, “the affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt *to hold to bail*. In *Haffey vs. Haffey*, 14 *Ves.* 261, *Ld. Eldon* said, “this writ has been considered in the nature of *equitable bail*, and under circumstances that would not entitle you *to bail at law*, you cannot have this writ here.” In *Jones vs. Alephsin*, 16 *Ves.* 470. *Ld. Eldon* said, “if it is settled, that though the plaintiff swearing to the balance of an account, may have *bail at law*, yet this court holding a concurrent jurisdiction upon the head of accounts, he may have the writ.” In *Dick vs. Swinton*, 1 *Ves. and Beame*, 372. *Ld. Eldon* said, “this court has made use of this great prerogative writ, for the purpose of holding a man to what is called *equitable bail*,” and in ordering the writ to issue, remarks, “this writ has been modelled upon the view which the court has taken upon the answer as to the sum for which the defendant ought to be *held to bail*. In *Stuart vs. Graham*, 19 *Ves.* 312. *Ld. Eldon*, in speaking of the case of *Dick vs. Swinton*, says, “that the grounds upon which the writ was discharged in that case were, that the court considering this in the nature of *equitable bail*, &c. and in the same case, *pages* 315, 316, the lord chancellor said, “I admit the hardship that may be the effect of granting this writ, &c. but the case of *bail*,



if this is to be assimilated to that, has all that hardship ;” and after taking time to examine as to the sufficiency of the affidavit, it having been made by the committee of a lunatic, he ordered the writ to issue with these remarks. “ They hold to bail at law in bankruptcy, on the oath of the assignee, when the bankrupt will not make the affidavit ; and I am informed that they have held to *bail at law*, upon the oath of the committee of a lunatic.”

In *Raynes vs. Wyse*, 2 Mer. Ch. Rep. 472, the writ of *ne* previously arrested at suit of the plaintiff for same debt, and *exeat* was discharged on the ground that the party had been discharged by him. In *Goodman vs. Sayers*, 5 Mad. Ch. Rep. 471, the vice chancellor said, “ the writ of *ne exeat* is granted in support of a bill filed for an equitable demand, as bail is required at law in support of an action.” In *Grant vs. Grant*, 3 Rus. Ch. Rep. 598, the lord chancellor, after remarking that the plaintiff cannot sue at law while an injunction is continued, says, from the analogy “ he cannot be entitled to the benefit of a writ of *ne exeat* which comes in lieu of an arrest at law, &c.”

In *Beame's Treatise on Ne Exeat* 43, it is said, “ on the ground that this writ is in the nature of equitable bail, the court has, in many instances, shown a desire to preserve a certain analogy between the writ of *ne exeat regno* and bail at law ;” and the same general rule is more fully stated in 1 *Hovenden on Frauds*, 131, where it is said that “ this writ is now looked upon only as a civil process to hold a party to bail for an equitable debt, under the same circumstances in which, if the debt were a legal one, he might be held to bail at law.” Citing the case of *Flack vs. Holm*, 1 Jac. and Walk. 416 ; and the quotation here made from 1 *Hovenden on Frauds*, will be found to be the words of *Ld. Eldon*, by reference to *Jac. and Walk.* In *Spencer vs. Porter*, 2 J. C. R. 169, chancellor *Kent* grants the writ, but with an express disclaimer “ that it would not be holding the party to bail when it could not be required, nor would it be exacting double bail ;” and in *Smedberg vs. Mark's Ex.* 6 J.

C. R. 138, one of the grounds assigned by the chancellor for refusing the writ of *ne exeat* was, that the bill did not charge that assets had come to the hands of the defendant, and the demand arising in *auter droit* rendered that allegation indispensable, "otherwise it would be holding one to bail who could *not be held to bail at law*. And the cases of *Nixon vs. Richardson*, 4 Des. Eq. Rep. 108, and *Rhodes vs. Cousins*, 6 Randolph, 188, will be found to establish the same doctrine.

There is no case in which the converse of the position assumed by me has been decided, although there are a few *dicta which intimate*, that there is a distinction between bail at law and sureties in a *ne exeat* bond. The first case to be found is that of *De Carriere vs. De Calonne*, 4 Ves. 490, in which the chancellor says, "*the application for the writ of ne exeat stands upon a ground perfectly different from an affidavit in a court of law to hold to bail*. That is a process which the party has a right to take upon his own affidavit without an application to the court. But an *application for the writ of ne exeat regno* is to the discretionary power of this court.

The only difference between bail at law and this writ, according to this case, consists in the *form* of obtaining them. "*The application for the writ*," says the chancellor, "*stands on ground perfectly different*"—Bail at law being obtained without an application to the discretionary power of the court. But the writ of *ne exeat* issues to hold the party to bail for an equitable demand, and is in its effects precisely similar to taking bail at law, is not denied; the only perceivable distinction being as to the *application or mode* of procuring it, and such a difference may be admitted without its affecting the view I have taken, for it equally prevails with regard to every other analogous proceeding of the two courts.

In *Hannay vs. McEntire*, 11 Ves. 55, *Ld. Eldon* said, he did not know that he ought to grant the writ merely because a judge at chambers would order bail, and he refers

to the contrariety in the practice of the courts of law in holding to bail. This is a mere annunciation of the *discretionary* power of the court of chancery over the application. In *Hyde vs. Whitfield*, 19 Ves. 344, *Ld. Eldon* says, “the analogy between this writ and bail at law is not *universal*,” and for the distinction he again refers as in *Hanney vs. McEntire*, to the fact, that “the court of king’s bench formerly would not hear a defendant to reduce the amount in which he had been held to bail, but this court always heard a defendant attempting to get rid of this writ,” and yet in the very same opinion, he says, “here, as at law, where the party is to be held to bail, the affidavit must be positive.”

In the last case *Ld. Eldon* attempts to rest the distinction upon the fact, that at one time the practice of the court of chancery with regard to discharging the writ, and that of the king’s bench as to releasing bail, were wholly different. The latter considering the affidavit decisive, while the former would examine into its merits. It should be recollected that the court of common pleas have always inquired into the propriety and amount for which bail should be taken, and even the rule of the king’s bench had been changed at the time *Ld. Eldon* made the remark, so as to conform to the practice at *nisi prius*, as is admitted by him in the case of *Stuart vs. Graham*, 19 Ves. 315.

But independent of the express words of *Ld. Eldon*, in *Flack vs. Holm*, 1 Jack. and Walk. 416, the case of *Amsinck vs. Barklay*, 8 Ves. 594–7, shows how far he has carried the analogy. In that case the writ was discharged upon the rule of law that a party could not be held to bail a second time on the same cause of action: and although in *Hyde vs. Whitfield*, he undertakes to deny the analogy, or more properly, “that the analogy is *universal*” between this writ and bail, yet in all the cases he clearly admits that the strength of the analogy controls and determines the fate of the application: for in *Amsinck vs. Barklay*, he refuses the writ out of respect for an antiquated rule of law



which modern decisions have not only denied the general application of, but narrowed down to cases of gross laches, or purely vexatious arrests. *Vide 1 Bacon's Ab.* 329, *title bail, letter B, sec. 3.*

Whether the writ of *ne exeat* be a process to which the party is entitled as matter of right, as was said by *Lord Keeper, Wright, and Sir Samuel Romilly*, and admitted by chancellors *Eldon and Kent*, or depending upon the discretion of the court, and whether it be universally analogous to bail at law or not, cannot vary or destroy the force of my argument. It is sufficient to sustain my proposition, that the concurrent opinion of the *English* chancery bench has definitively settled, that to warrant its issuing there must be an affidavit of precisely the same character with that which is necessary *to hold to bail at law.* 10 *Ves.* 164. 14 *Ib.* 261. 16 *Ib.* 470. When it issues, the defendant is to “*give bail.*” 5. *Ves.* 97. 1. *Ves. and Bea.* 372. 19. *Ves.* 312, 344. 1 *Jac. and Walk.* 416. 5 *Mad. Ch. Rep.* 471. That if it was granted after an arrest at law, it would be requiring “*double bail.*” 3 *Per. Wm.* 312. 8 *Ves.* 593. *Ib.* 594–7. 2 *Mer. Ch. Rep.* 472. That it is attended with the same hardships as bail, 19 *Ves.* 316, and that it will not issue when under similar circumstances bail would not be required at law. 14 *Ves.* 261. 2 *J. C. R.* 169. 6 *Ib.* 138. *Cox vs. Scott*, 5 *Har. and John.* 384.

I maintain that these cases demonstrate beyond successful refutation, the striking and strong analogy between the writ of *ne exeat* and bail at law, and clearly show, that the former is emphatically a mere civil process to obtain equitable bail. If then it be a proceeding in the nature of bail, and the court of chancery are regulated by that consideration, in ordering it to issue, will they disregard the rules which obtain at law, when a question is presented, involving the right of equitable bail to be released? If equitable bail are held by analogy to bail at law, are they not entitled to the benefit of the same analogy, when seeking



to be discharged? Unless the analogy prevails to that extent, it is odious and unjust.

Do courts of chancery deal less liberally with their bail, than courts of law? Do they countenance the rigorous and harsh prosecution of a surety, in cases which courts of law would not tolerate? Is the maxim of the court of chancery, that a surety shall be favorably regarded, and his liability never extended or enlarged, to be inverted in this case? If not, and the facts be of such a character as would, were we in a court of law, entitle bail to an *exoneretur*, these appellees ought unquestionably to be discharged.

The decree which was made in this cause, at the March term, 1830, of *Harford* county court, is certainly a final decree, at least it must be so considered as to the defendant, *Walton*; and the attachment undoubtedly issued for the purpose of compelling *Walton* to bring into court the amount directed to be paid by that decree. This proceeding was had under the 25 sec. 72 ch. of the act of 1785, by which the process of attachment, sequestration, *capias ad satisfaciendum*, and *fieri facias*, are made concurrent remedies to compel the performance of decrees. Under this attachment the defendant, *Walton*, was taken into custody of the sheriff, and a *committitur granted on motion of the appellant*, and I insist that the service of the attachment, and especially the commitment upon it, operates a discharge of the sureties in the *ne exeat* bond.

The same reason exists here as in the case of an arrest of the principal on *ca sa*, issued upon a judgment at law—the deprivation of the bail of all power over the body of the principal. If then it be true, as it indubitably is, that bail are regarded as their bailee's jailors; *Ex parte Gibbons*, 2 *Atk.* 239;—that they may break and enter a house to take him; 7 *Johns. Rep.* 156;—even the house of a third person; 2 *H. Black.* 120;—may pursue him into a foreign state and seize him on a Sunday; 7 *Johns. Rep.* 155;—may take him while in actual attendance as a witness on a court of justice, and

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without fresh process, and employ force if necessary. *Peake's N. P. C.* 226;—may depute this power to another, and in the case of the death of bail it will descend on his executor or administrator. 1 *B. and P.* 62. 7 *Mass. Rep.* 169. I ask if it be possible, that they can be shorn and stript of all these powers, upon a motion of the plaintiff, and yet be held responsible unless they render the body of their principal? Is not the situation of the bail so essentially changed and their risk so greatly augmented as manifestly to entitle them to an *exoneretur*? 10 *John. Rep.* 595.

But it is maintained on the part of the appellant, that *Walton's* being in custody for the contempt in not obeying the order of the court, was not equivalent to complying with it. To which we reply, nor is an arrest and imprisonment on a *ca sa*, equivalent to paying the judgment, yet it is undoubtedly sufficient to discharge the bail. It is further urged that the imprisonment cannot be regarded as a satisfaction of the "order," because a sequestration will issue, &c.

We admit, that according to the *English* practice, a writ of sequestration may properly issue while the party is in custody for contempt in not filing an answer, or not obeying any *interlocutory* order.

In this case however, the attachment did not issue in consequence of the parties refusal to comply with a *mere order*, nor was the application for it made to the *discretionary* power of the court; on the contrary it was a process resorted to as matter of right, under the provisions of the act of 1785, and indisputably issued *in the nature of an execution*, to coerce the performance of a decree, final to every purpose, so far as *Waller* was interested.

Had it been a mere attachment *for contempt*, issued in conformity with the *English* practice, it would be deemed in the nature of *mesne process*, and the sheriff might have taken bail. 6 *Taunt.* 569. 4 *Dow. and Ry.* 393. And will it be insisted that the sheriff was at liberty to take bail, upon the service of the attachment which was sued

out in this case. It cannot be pretended, that the sheriff may take bail on an execution. *Cro. Eliz.* 647. *Strange*, 479, and the court of Exchequer in *Philips vs. Barrett*, 4 *Price*, 23, expressly decided, that the sheriff is not authorised to take a bail bond, from a defendant in custody, under an attachment for non payment of costs, *because such a process is in the nature of an execution. Vide Pre. in Chan.* 331, where the same rule is distinctly laid down.

If then this be the legitimate rule, as stated in these authorities, and emphatically said by the lord chancellor in the case of *Morrice's Exr. and Widow vs. The Bank of England*, *Tal. Cas.* 222. "That as judgments at law may be executed by a *capias ad satisfaciendum* to take the person, *so similar to that, are attachments for not performing decrees.*" We maintain, that independent of the statutory provision by which the process of attachment is afforded, as a concurrent remedy with the *ca sa* and *fi fa*, the *English* practice and decisions explicitly determine such a process as the attachment, which issued in this cause, *to be an execution.*

We concede to the appellants, that a commitment under a *ca sa*, if the party escapes, is no satisfaction of the judgment, nor is a discharge under the insolvent laws, or any temporary exemption by privilege from imprisonment; but that in such cases the judgment is resuscitated, and the plaintiff re-invested with all his rights under it; and after an escape may resort to a new execution, or institute an action upon the judgment. 2 *Bac. Ab.* 240. 5 *Peters' Ab.* 40. But that cannot affect this case, for if it be granted, that the commitment under the attachment is so far distinguishable from the taking a party in execution at law, that it cannot be deemed a satisfaction of the decree after the escape, nor even while he continue in execution; still I contend, that in either case, it must be held to discharge the sureties in the *ne exeat* bond. Are not bail at law exonerated after the party is in custody on a *ca sa*, whether he



continue so, or affect his escape? Will it be pretended, that the escape revives the plaintiff's right against the bail? Had he in fact any right to be resuscitated? The error of the argument, on behalf of the appellant, is ascribable to his placing the bail's release on a wrong ground. The true reason of the bail's discharge, is not that the party has satisfied the judgment by being imprisoned ;" but it is, *that the execution divests them of their power over the body of their principal.* 7 Cowen, 472. And will it be permitted, that the relation between Walton and the appellees shall be so changed, without their agency or assent, as to make them liable, when they contracted in becoming his sureties, upon the faith of the relation being undisturbed, especially by the appellant? Can it be possible, that when that relation is materially changed without fault or laches, imputable to the appellees, or by any act which they could not control; nay, by an act of the very party to whose benefit the suretyship is intended to enure, they are still to be deemed liable? Can a result so obnoxious to every principle of moral right and equity, find its warrant in any adjudicated case?

But the appellant attempts to assimilate this case to that of bail *below*, or to the sheriff; and refers to a case in 1 East. 390, to show that they cannot surrender their principal, though he be in prison. Upon this subject, the courts in England have been gradually extending the rule in favor of the bail. It was once held, that nothing could discharge the bail *below*, but putting in bail *above*. 5 Burr. 2683. But the later cases all show, that if the sheriff accept the render, the bail bond is cancelled. *Stamper vs. Melbourne*, 7 Term. Rep. 122. *Sharp vs. Sheriff*, *Ib.* 226. And the case cited by the appellant's counsel from 1 East. is to the same effect. And according to the more recent case of *Lewis vs. Davies*, 5 Moore's Rep. 267, it would seem, that this inclination of the courts to favor bail to the sheriff, is continuing to encroach on the former rules; for in that case, it was held that no action could be maintained on the bail bond, the party having surrendered himself to



the jailor, although the under sheriff expressly refused to receive the render. But if it be taken as conceded, that bail to the sheriff cannot render their principal in discharge of themselves, yet the analogy attempted to be sustained between bail to the sheriff, and sureties in a *ne exeat* bond, is wholly untenable on principle. The appellant's counsel adverts to the character of their respective engagements, in support of the analogy. To my apprehension, that clearly shows the wide difference which exists between the cases. What is the stipulation of bail to the sheriff? It is that the party shall appear, &c. The great object of taking bail below, is to compel an appearance at the return of the writ. The bond however, is not exacted for the benefit of the plaintiff, but the protection of the sheriff. The idea that the statute was peremptory on the sheriff, and coerced the transfer, has long been exploded; and hence it is, that the courts have inclined to leave it discretionary with the sheriff, to accept a render or not, as he might deem prudent. It is entirely optional with the sheriff, whether he will assign the bond, and if he offer to do so, the plaintiff may undoubtedly elect whether he will accept it, or rule the sheriff to bring in the body. But are such the characteristics of a *ne exeat* bond? Is it taken for the benefit or protection of the sheriff? May he dispense with it as in ordinary cases of bail? Is its condition that the party shall appear, &c.? Is its object to compel him to appear? or as *Ld. Thurlow* says, in *Atkinson vs. Leonard*, 3 Bro. Ch. Rep. 218, to "secure the demand" by compelling the party "to abide the justice of the case." The command of the writ is that he shall take "*bail*," that the party do not depart the State, &c. Does the sheriff return this writ "*cepi corpus*," or is he according to the form in *Impey's Sheriff*, 367, to return "that he caused the defendant to appear before him, and that he found bail according to the command of the writ?" Could the sheriff upon a return to the *ne exeat*, as in the case of a return of "*cepi*," to a writ sued out of the court of law, be laid under

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rule, or an attachment issue to compel him, to bring in the body of the defendant. Is it optional with the sheriff whether he will return the *ne exeat* bond? Will it be pretended that he can conceal it? It must therefore be obvious, that there is not the slightest similitude between the case of bail to the sheriff and sureties in a *ne exeat* bond. The application of the appellees to have the bond as to them cancelled, might be made at any time subsequent to the commitment on the attachment, which we insist *per se* operated their discharge. It has been repeatedly settled, that it is not necessary to enter an *exoneretur* on the bail bond, and in the case of *Milner and another vs. Green*, 2 Johns. Cas. 283, the motion for an *exoneretur* was denied on the express ground, that it was not "usual or necessary" to make the entry, as a party's arrest on a *ca sa*, and discharge under a commission of bankruptcy, necessarily discharged the bail. *Loflyn and another vs. Fowler*, 18 Johns. Rep. 335. The case of *Stapylton vs. Peill*, 19 Ves. 615, is in many respects distinguishable from this. The application there, was to surrender the defendant after a commitment for contempt in not filing an answer. This could not be granted, as the writ issues according to *Beames on Ne Exeat*, 65, "until answer and further order." The defendant must answer before he can move to have the writ discharged, *Ib.* 66, and *Russell vs. Asby*, 5 Ves. 97. Again, the commitment in that case was under a necessary *interlocutory* order, made in the regular progress of the case, while here, it was under process sued out on a *final decree*, and intended to coerce the performance of that decree. And I insist, that the writ of *ne exeat* must be held to have discharged all its offices, when it detains the party until other and final process may be resorted to. If under any aspect in which it may be regarded a contrary doctrine were to prevail, writs of *ne exeat* might accumulate in any given case *ad infinitum*. But it has been settled, that the court of chancery will not grant a *ne exeat* when they can order other, equal-

ly available, process. *Goodman vs. Sayers*, 5 *Mad. Ch. Rep.* 471.

The case of *Le Clea vs. Trot*, *Pre. in Ch.* 230, is denied to be law, and was expressly overruled by the decision of *Ld. Hardwick*, in the case of *Debazin vs. Debazin*, 1 *Dickens*, 95, and which we aver to be an authority strictly in point, and must be regarded as definitively settling the question of liability in this case.

In addition to the fact that this decision of *Ld. Hardwick's* is sustained by all the analogies of law, and by abstract principles of moral justice, I need only remark in the language of a distinguished contemporary, that not one of his decrees was reversed, although he held the office of lord chancellor for upwards of twenty years. There is another view of this case which I desire to present in conclusion.

When the writ of *ne exeat* issues, and bail is given to the sheriff, the uniform practice is to discharge the writ upon the defendant's filing his answer, and tendering a bond to abide and perform the decree, &c. *Beame on Ne Exeat*, 58, 68. 2 *Atk.* 66. 3 *Ib.* 409. *Ambler*, 177. 1 *Ves. and Bea.* 129. 3 *Bro. Ch. Rep.* 218. 3 *Johns. Ch. Rep.* 414.

The condition of such a bond, according to the rules of the court of chancery in this State, per chancellor *Kilty*, in the case of *Cox vs. Scott*, 5 *Harr. and Johns.* 384, is "that the defendant shall perform the decree, or render his body to the custody of the sheriff, to whom any writ of *attachment* or *ca sa* shall be directed."

I maintain then, that the *ne exeat* bond cannot impose a higher or greater responsibility than the bond to abide and perform the decree, &c. If their respective conditions are to be construed with reference to the objects contemplated by their execution, they must undoubtedly be regarded as indetical—I mean where the *ne exeat* bond has continued in full force until after a final decree in the cause, and which is placing it in the most unfavorable light to the appellees. If this aspect of the case be correct, we have only to look



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at the condition of the bond to abide and perform the decree, in order to ascertain the true and legitimate character of the *ne exeat* bond.

In support of this view I shall be permitted to ask what is the object and effect of a bond to abide and perform the decree, &c.? It is, according to the settled practice of the court, to discharge the writ, and by consequence the *ne exeat* bond. The bond to provide and perform the decree, &c., gratifies all the purposes of the writ. In the case of *Atkinson vs. Leonard*, 3 Bro. Ch. Rep. 218, Lord Thurlow said, “beyond securing the demand there is no reason for the writ of *ne exeat*. It should be used only to compel the party to abide by the justice of the case.” If then this bond, because it “secures the demand” by coercing the party “to abide the justice of the case,” has been invariably held to operate a discharge of the writ of *ne exeat*, will it be pretended that it is a security in any sense less comprehensive or available than the *ne exeat* bond. The bond exacted by the sheriff is a mere assurance of obedience to the writ, while the bond to abide and perform the decree, &c. &c., dissolves the writ itself, and must of necessity supersede all the obligations growing out of it. How is it then that this bond operates the rescission of the *ne exeat* bond, if it be not of equal dignity and co-extensive in its condition. Can it be supposed that the practice of the court, in accepting such a bond as a substitute for the writ and *ne exeat* bond, tends to diminish or impair the creditors security; and when that very bond, according to Lord Thurlow, dispenses with the “reason for the writ” by “securing the demand? Will it be affirmed that the court of chancery, in receiving such a bond, contravene a well settled rule of law, that the less shall not extinguish the greater security? It is apparent then, that the *ne exeat* bond is to be placed on the same footing with the bond to abide and perform the decree, &c. And hence, it inevitably follows, that whatever would constitute an available defence for the sureties in the latter,



must enure the release of those in the former. And the very letter of the latter bond was complied with in this case—the defendant, *Walton*, having been regularly committed on an attachment issued to compel the performance of the decree.

STEPHEN, J., delivered the opinion of the court.

This is an appeal from an order of *Harford* county court, acting as a court of equity, by which the bond of the appellees was ordered to be cancelled, so far as related to them, in their capacity of sureties, for a certain *Nathan Walton*, who had been taken under a writ of *ne exeat*, issued against him, in a suit of the appellant against him in said court. By the final decree of the court in the said cause, the defendant, *Walton*, was ordered to bring into court the sum of money therein mentioned, on or before a certain time specified in said decree.

*Walton* having failed to comply with this judicial mandate of the court, process of attachment was issued against him, by virtue of which he was arrested, brought into court, and on the application of the complainant, committed by the order of the court to the custody of the sheriff, to be safely kept till he complied with said decree. While in the custody of the sheriff, he effected his escape from imprisonment, and the question which this case presents for adjudication is, whether the decree of *Harford* county court was correct, according to the principles of equity, in discharging the sureties from their responsibility, under the above circumstances? To determine this question, it is only necessary to consider, what is the object and design of the writ of *ne exeat*, as used by courts of chancery in the exercise of their equity jurisdiction. It is to hold the party amenable to justice, and to render him personally responsible for the performance of their orders and decrees. The obligations devolved upon the sureties entering into the bond, bear a close resemblance to the duties and responsibilities

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of bail, at common law. The bail assume upon themselves the obligation, that their principal shall pay the debt, or be personally amenable to the final process of the court; and the sureties in the *ne exeat* bond undertake, that the defendant shall be personally responsible for the performance of the orders and decrees of the court. To this extent they become answerable, and when this duty has been fulfilled, their engagements, under their bond, are at an end.

That this is a correct view of their responsibility, appears from the following case, in 1 *Dickins*, 95, which is so strikingly similar in all its features, to the present case, that we think it proper to incorporate the whole of it into this opinion. The case was as follows. "The plaintiff having sued out a writ of *ne exeat regno*, against the defendant, he entered into a bond with two sureties, for his not departing the kingdom. The cause was afterwards heard, and there was a decree against the defendant for the same matter, for which the writ of *ne exeat* issued. The defendant being in contempt, and in custody for not performing the decree, the sureties applied, and obtained an order, that they should be discharged, and the bond, as to them, cancelled."

It is true that in the case referred to, the defendant was in custody for not performing the decree at the time the sureties obtained the order, that they should be discharged, and their bond cancelled, but the principle of the decision shows in the clearest light, the extent of their liability, and establishes beyond controversy, that so soon as the defendant is in custody under the final decree, their bond has performed its office, and their responsibility under it is at an end. If such be the legal effect and operation of the commitment of the defendant to the custody of the sheriff, for a contempt in not performing the decree, it is conceived that his sureties are not responsible for his subsequent escape from the sheriff, who is an officer of the law, and whose duty it was to keep him in confinement.

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We therefore think, that the decision of the court in this case was correct, and that the order appealed from ought to be affirmed.

ORDER AFFIRMED.

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THOMAS & JAMES HUNTER vs. BRYSON, *Adm'r c. t. a.* of  
JOHN MACARTNEY, JR.—*December, 1833.*

Where a testator in *Ireland*, appointed executors there, and declared that certain persons should be trustees of his property in *America*, with power and direction to collect and remit the same to his executors in *Ireland*, such persons are to be considered, not as trustees, but as limited executors, and bound to execute the trust in the mode prescribed by the will under which the authority was derived.

A testator may appoint different executors in different countries in which his effects may lie, or different executors, as to different parts of his estate in the same country.

A testator cannot appoint a trustee of his personal property by his last will, so as to evade the provisions of the testamentary system. Such a trustee cannot act in the first instance without taking out letters testamentary or of administration, and having taken out letters of administration, if the duties imposed upon him by the will, as trustee, are the same which as administrator he is bound by law to perform, he cannot discharge himself as administrator by a payment to himself as trustee.

APPEAL from the Orphans Court of *Baltimore* county.

In this case a petition was filed by the appellant, *Thomas Hunter*, against the appellee, on the 1st of June, 1832, stating that by the last will of *John Macartney, Jr.*, *Hugh Thompson*, *Nathan G. Bryson*, the appellee, and *Thos. Humes*, of *Baltimore*, were appointed trustees of all his property in *America*. That *Thompson* and *Humes* refused to act, and that letters of administration, *c. t. a.* on the estate of the testator, were granted *Bryson* by this court, in which character he had received a large sum of money, for which he has not accounted. That by the will of the testator, the moneys so received and retained by *Bryson*, are payable to



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the petitioner, and a certain *Andrew Patrick*, now deceased, and he prays that the appellee may be decreed to pass an account, and pay the balance in his hands over to the said petitioner.

By the will of *Macartney*, a copy of which was exhibited with the petition, the petitioner and *Andrew Patrick*, of *Ireland*, are appointed trustees and executors; and after directing the payment of a number of legacies in *Ireland* and *America*, and among others, one of £100 to the petitioner, *James Hunter*, “now gone to *America*,” the will proceeds, “and as all the property that I have now willed, is in our firm in *Baltimore* in *America*, known by the name or firm of *Macartney & Sanders*, I therefore nominate and appoint *Hugh Thompson*, merchant, *Nathan G. Bryson*, and *Thomas Humes*, all of *Baltimore*, in *America*, trustees of all my property in *America*, and it is my will, that these trustees that I have nominated and appointed, to do all my said *American* affairs, shall have full power to act for me, and to settle all my accounts in the way they shall think best; and so soon as they conveniently can, they shall remit said property to my trustees and executors, that I have hereby nominated and appointed in *Ireland*.”

The answer of *Bryson*, the appellee, denies the right of the petitioner to call him to an account, or to enforce the payment by him of any balance in his hands, as the administrator of *Macartney*.

Afterwards the parties filed the following agreement:

“It is agreed that the petition heretofore filed by *Thomas Hunter*, shall be considered as amended by adding *James Hunter* thereto, as a co-petitioner, for the distribution of the deceased *Macartney*’s effects, according to the just construction of his will. That *Thompson* and *Humes* renounced all rights under the said will, when the said *Bryson* was appointed administrator. That *Bryson* has passed two accounts, the first in 1827. By the last of which there remained in his hands a balance of \$1350 98, due the estate. That *Andrew Patrick* named in the will of *Macartney*, died



before the petition was filed in this cause, and after *Macartney's* death; and that the said *Thomas Hunter*, when the said petition was filed, and now, resides in the State of *Vermont*, and that *James Hunter*, the legatee, resides in *Baltimore*. It is also agreed, that the answer of *Bryson* shall be considered as so amended, as to ask of this court to allow him to pay over to himself as trustee, the balance in his hands as administrator, in the same way as if he had filed a petition asking for permission to do so."

The orphans court decreed, that *Bryson* settle another account, in which he is to receive credit for the balance due on his last account, *as paid over to himself as trustee*, under the will of the deceased, for the purposes therein mentioned. From this decree, the petitioners appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Gill*, for the appellant, contended,

1. That the power conferred upon the *American* trustees under the will, was a mere agency to collect the deceased's funds, which is void, being in opposition to the design and spirit to of our testamentary laws.

2. That the authority given to the *American* trustees, was a naked power, given collectively to the three persons named, and that when two of them renounced, the third could not act. Every authority of this description is to be strictly pursued, and when communicated to two jointly, ceases with the death of one. 1 *Liv. on Agency*, 79. 2 *Kent's Com.* 495. *Bergen vs. Duff*, 4 *Johns. Ch. Rep.* 368. *Patterson vs. Leavitt*, 4 *Conn. Rep.* 52, 52.

3. That *Bryson* having received the estate as administrator, must account to the persons beneficially interested, in that character. To the *American* legatees directly; to those in *Ireland* through the petitioner, *Thomas Hunter*, who represents them.

4. That *Bryson* having omitted, from 1827 to 1832, to remit these funds, has evinced such a gross neglect of duty as to have forfeited all rights as trustee, even if he had any, and ought not to be permitted now to delay the final settlement of the estate.

To show how the distribution should be made, he referred to *Dawes vs. Head*, 3 *Pick. Rep.* 128. *Ib.* 144. *Harvey vs. Richards*, 1 *Mason*, 411 to 415. 2 *Kent's Com.* 344 to 347. Act of 1798, *sub-ch.* 15, *sec.* 12. *De Sobry vs. De Laistre*, 2 *Harr. and Johns.* 224.

*Mayer* for the appellees.

This is principally a question of jurisdiction. The will creates a trust which the orphans court is not competent to enforce. The *Irish* executors are merely executors; but the parties in *Baltimore* are expressly constituted trustees. The authority and duties of the former are entirely local, and the court of chancery only, could compel them to remit money to a foreign country; whilst by the express terms of the trust, the latter are required to do. An administrator cannot be made to remit money abroad. 1798, *sub-ch.* 10, *sec.* 6, 10.

The subject of remitting money abroad depends upon judicial discretion, and the power cannot be exercised by the orphans court, whose jurisdiction is limited and defined by law. Even if *Bryson* had been named executor in the will, and such powers as were conferred on the trustees in this country had been superadded, they would have made him a trustee, and amenable only to the court of chancery. It would not have been within the jurisdiction of the orphans court, to take cognizance of the performance of such powers. *Jeremy's Eq.* 138. *Scurfield vs. Howes*, 3 *Bro. Ch. C.* 91. *Southouse vs. Bate*, 2 *Ves. and Bea.* 396. *Osgood vs. Franklin*, 2 *Johns. Ch. Rep.* 21. *Davour vs. Fanning*, *ib.* 252. There is a great difference between a mere naked power, and a power coupled with a trust. The *Irish* executors could not as such recover money from

the *American* administrator. The trust survived to *Bryson*, though a mere naked power might not. *Osgood vs. Franklin*, 2 *Johns. Ch. Rep.* 21. *Davour vs. Fanning*, *Ib.* 252. And when the trustees disclaimed, the trust devolved on *Bryson* alone. *Adams vs. Taunton*, 5 *Mad. Rep.* 435. It is impossible to suppose, that the testator designed that all the parties should act collectively, or not at all; as in that event his object would be defeated by the refusal to act, or the death of one, or more of them, an event by no means improbable.

But suppose the trust was in fact defeated by the renunciation of two of the trustees; still as one had been created, the court of chancery alone could appoint another to execute it; or the legatees might at once file their bills for their legacies. *Ellison vs. Ellison*, 6 *Ves.* 662. *Brown vs. Higgs*, 8 *Ves.* 570.

The foreign executors had no right to recover the money from the domestic administrators. *Dawes vs. Head*, 3 *Pick.* 128. *Harvey vs. Richards*, 1 *Mason*, 413. *Ib.* 423. *Kraft vs. Wickey*, 4 *Gill and Johns.* 332. *Morrell vs. Dickey*, 1 *Johns. Ch. Rep.* 156. *Smith vs. Union Bank of Georgetown*, 5 *Peters*, 518. *Guier vs. O'Daniel*, 1 *Binney*, 349. 2 *Mass. Rep.* 384. *Harvey vs. Richards*, 1 *Mason*, 415. And there is difference between what are called ancillary and principal administrators. *Bryan vs. McGee*, 2 *Wash. C. C. R.* 337.

If the persons named in *Ireland* are to be considered in the character of trustees as well as executors, still they could only fill those characters in *Ireland*. Their remaining there was a condition annexed to the trust, and one being dead, and the other having moved to this country, their authority has ceased. *Coke Lit.* 27. 1 *Cruise's Dig.* 79. 1 *Roper on Leg.* 521, 522. *Ib.* 506. The court will look through the will, and if from its whole terms, they think that the trust was imposed because the parties resided in *Ireland*, they will imply such a condition, and upon their ceasing to reside there, the authority will be revoked.



Joining one of the legatees in the present petition makes no difference, because if the executor is entitled to receive the money from the defendant, the legatee is not ; and in fact he is to be considered as uniting in the prayer of the petition, that the money may be paid the executor.

DORSEY, J., delivered the opinion of the court.

In decreeing that *Nathan G. Bryson* had a right to pay over all the funds in his hands as administrator with the will annexed, to himself as trustee, under the will of the deceased, and that he pass an account accordingly, we think the orphans court were in error. As to all his property and affairs in *America*, the testator, in most explicit terms, gave to *Hugh Thompson*, *Nathan G. Bryson*, and *Thomas Humes*, the same powers, and imposed on them the same duties, as if by his will he had, in so many words, appointed them his executors. This provision of the will, *per se*, created them limited executors, and two of them having declined the appointment, and the third accepted it, he is bound to execute the trust, in the mode prescribed by the instrument under which he derives his authority.

A testator may appoint different executors, in different countries, in which his effects may lie ; or different executors, as to different parts of his estate in the same country. Whether letters testamentary, or of administration *cum testamento annexo*, have been granted in this case, is a matter wholly immaterial, so far as respects the present controversy. The directions of the will must be complied with ; and *Nathan G. Bryson*, in his representative character, should be decreed to transmit or pay the funds in his hands to the executor in *Ireland* ; or show some satisfactory reason for his being excused from so doing.

But suppose *Bryson* not to be created executor by the clause in the will, which has been referred to, and that the testator's design was, that the persons appointed should act literally as trustees, without taking out any letters testamentary, or of administration. The appointment is a nullity,



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as far as the personal estate is concerned, being an attempt to evade the provisions of our testamentary system, in a way which the law does not tolerate.

The administrator in relation to the personalty, is *ex officio*, bound to the execution of every duty, with which it was illegally attempted to clothe the trustees. And the effort to transfer the funds in the manner proposed by the decree, from the hands of *Nathan G. Bryson*, as administrator, to those of *Nathan G. Bryson*, as trustee, is giving a construction to the act of the testator, to which no principle of judicial interpretation will lend even a momentary sanction.

The legatee, *James Hunter*, has assigned no sufficient reasons for his coming into the orphans court, and demanding of *Bryson* the payment of his legacy. If any special circumstances exist, warranting the interposition of a court of chancery in his behalf, he had better apply to that tribunal for relief.

The decree of the orphans court is reversed, and the record remanded, that such proceedings may be had therein, as the nature of the case may require.

DECREE REVERSED.

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WILLIAM GRAHAME AND JOHN PARRAN, Ex'ts of RICH'D.  
GRAHAME vs. HARRIS, PARRAN & Co. use THOMAS W.  
HARRIS.—*December*, 1833.

A plaintiff at law cannot unite in his declaration, counts against the defendant, in the character of executor, with counts against him individually; and if this is done, under our practice, the defendant may move the court at the trial, to instruct the jury that the plaintiff cannot recover in that state of the pleadings, because of the misjoinder of actions.

Under the act of 1825, ch. 117, to authorize the court of appeals to reverse a judgment of the county court, it must appear by the bill of exceptions that the point or question upon which the reversal is sought, was presented to

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the county court, and that the judgment was rendered upon such point or question.

So where there was a misjoinder of causes of action in the plaintiff's declaration, some being against the defendant in one character and some in another, and the defendant at the trial moved the county court to instruct the jury, that the plaintiff cannot recover, because it was for a debt contracted for goods sold since the death of the defendant's testator, and the court refused the direction prayed for, and instructed the jury, that if they believe the defendant purchased the goods charged, they should find for the plaintiff; the defendant upon appeal cannot insist upon the misjoinder of counts as a ground of reversal, but must be confined to the question presented to and decided by the county court, and which assumed there was but one class of counts in the declaration.

Where a jury has been sworn, the defendant cannot call upon the court to *non pros* the plaintiff's suit without the plaintiff's consent.

A man cannot bring an action at law against himself. The same natural person cannot be both plaintiff and defendant on the record.

H, P & S, partners in trade, sold goods to G and P; after this, P assigned his interest in the claim to H, for value. HELD, that H, P & S could not sue G & P at law, for the use of H.

### APPEAL from *Calvert County Court*.

This was an action of *Assumpsit*, instituted on the 14th of July, 1830, by the appellees, *Thomas W Harris, John Parran*, and *Robert H. Smith*, trading under the firm of *Harris, Parran & Co.* against the appellants, as the executors of *Richard Grahame*. The declaration contained a count upon the promise of the testator, for matters and articles properly chargeable in account; for goods, wares, and merchandize, sold and delivered to the testator; for goods, &c. sold and delivered the defendants' executors as aforesaid, and for which they, executors as aforesaid, promised to pay; for money paid, laid out and expended, at the request, and for the use of the defendants, and for which the defendants, executors as aforesaid, promised to pay; and on an *insimul computassent* with the defendants, executors as aforesaid.

The defendants pleaded *non assumpsit*, and limitations, to which there were issues.

1. At the trial the plaintiffs proved, that *William Gra-*

*hame*, one of the executors, said he had examined the plaintiffs' books of accounts, at the request of *Parran*, the other defendant, and that he thought the claim ought to be paid, though *Parran* opposed it. He further proved, that the debt was contracted with, and due and owing by the appellants, to the appellees trading under the firm of *Harris, Parran & Co.* and that before this action was brought, the partnership existing between *Thomas W. Harris, John Parran*, and *Robert H. Smith*, was dissolved, and *John Parran*, one of the legal plaintiffs, and also one of the defendants, assigned all his interest in the said account, for value received, to *Thomas W. Harris*, for whose use the action is brought.

The defendant then proved, that *Richard Grahame*, the testator, died just before the first item charged in the account, upon which the present action is founded, was sold; and that *John Parran*, one of the plaintiffs, and *John Parran*, one of the defendants, is one and the same person. The defendants then prayed the court to instruct the jury, that the plaintiffs cannot recover in this action, because it is for a debt contracted, for goods sold, and delivered since the death of the testator. But the court (*KILGOUR* and *WILKINSON, A. J's.*) refused the instruction as prayed; being of opinion, and so directing the jury, that if they find from the proof, that *William Grahame* and *John Parran* purchased the goods charged in the account, they should find for the plaintiffs. The defendants excepted.

2. The defendants then prayed the court to *non pros* the action, upon the ground that *Parran* being one of the legal plaintiffs, the action could not be supported against the defendants, one of whom he also was. This the court refused to do, and decided that the action might be supported. The defendants excepted.

3. The plaintiff *John Parran*, then offered by his counsel to *non pros.* the action; but the other plaintiffs objecting, the court would not permit it to be done. The defendants excepted.



There was a verdict for the plaintiffs; and the judgment of the court being that they recover the amount of the same from the defendants, executors as aforesaid, with costs, they prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

*Brewer* for the appellants, contended,

1. There is a misjoinder of actions. The two first counts are on the promises of the testator. The last on the promises of the defendants in their individual capacities. In the three last counts, there is no averment of indebtedness, or promise by the defendants, *as executors*, as there should have been. *Chapman vs. Dixon admr.* 4 *Harr. and Johns.* 527. And there is nothing in the act of 1825, *ch.* 117, which prevents the court from noticing this objection. *Charlotte Hall School vs. Greenwell*, 4 *Gill and Johns.* 407. The exception need not assign the true reason. If the objection appears to have been presented to the court, it is sufficient. *Sothoron vs. Weems*, 3 *Gill and Johns.* 435. *State use Jackson vs. Edelin*, 4 *Gill and Johns.* 277. *Cox vs. Jones*, 5 *Ib.* 65.

2. The judgment is *de bonis propriis*, when it should have been *de bonis testatoris*, and cannot be sustained on any of the counts. This defect is not cured by the act of assembly, which makes the judgment good if there is one good count. That act applies simply to cases of good and bad counts; but has no application where the counts are inconsistent, as here.

3. The circumstance, that the same person is a plaintiff and defendant, is fatal to the action. 3 *Black. Com.* 18.

*Gill*, for the appellees.

1. The only point presented to the county court by the defendant's first prayer, was upon the right of the plaintiffs to



recover ; because the claim sued on was for goods sold the defendants after the death of their testator. If the judgment of the court is to be reversed, it must be because that objection is a good one. This court can notice no other. *Sasscer vs. Walker*, 5 *Gill and Johns*. 110.

2. As *Parran*, one of the plaintiffs, had assigned his interest to one of the others for value, it is no objection to the action that he was also a defendant. *Owings and Piet vs. Low*, 5 *Gill and Johns*. 135. 1 *Chitty's Pl.* 25. The assignment by *Parran* for value was equivalent to an agreement, that the money should be recovered against him by the other plaintiff. *Vanness vs. Forrest*, 8 *Cranch*. 30. *Mainwaring vs. Newman*, 2 *Bos. and Pul.* 120, 124. (e)

3. The judgment is justified by the third count, which is sufficient to charge the defendants in their individual capacities.

BUCHANAN, Ch. J., delivered the opinion of the court.

There are five *counts* in the declaration filed in this case ; some against the appellants as executors of *Richard Grahame*, and some against them in their individual capacities ; and the account upon which the action is founded, is for goods sold and delivered to the appellants after the death of the testator, as executors. It appears too, in evidence, that *Parran*, one of the appellants, was a partner in the house of *Harris, Parran*, and *Smith*, of whom the goods were purchased, and by whom the suit was brought ; he, *Parran*, having assigned his interest in the claim to *Harris*. So that *Parran* was both a legal plaintiff, and a defendant in the action.

The appellants at the trial, moved the court to instruct the jury, that the appellees "could not recover under the pleadings in the cause, because it was a debt contracted for goods sold and delivered since the death of the testator." Which instruction the court refused to give, but directed the jury to find for the appellees, if from the proof, they should find that the appellants purchased from them the

goods charged in the account. And the appellants excepted.

That the uniting in the declaration, counts against the appellants in their character of executors, with counts against them in their individual capacities, was a misjoinder, of which advantage might been taken, in a proper form, cannot be questioned. And it is upon the ground of that misjoinder, and also, because one of the appellants was both a plaintiff and defendant in the action, that exception is here taken to the refusal of the court to give the instruction prayed, and to the direction that was given.

And if we were not restrained by the act of 1825, *ch. 117, sec. 1*, we should feel ourselves obliged to say, that in that state of the pleadings the appellees were not entitled to recover. But that act provides, “that the court of appeals shall not reverse any judgment, on *any point or question, which shall not appear to have been presented to the county court, and upon which that court may have rendered judgment.*” The provision, it will be seen, is not that the court of appeals shall not reverse any judgment, on any point or question which shall *appear, not* to have been presented to the county court, but “which *shall not appear* to have been presented to the county court.” So that to authorise this court to reverse any judgment of a county court on any point or question, it must appear to this court, that such point or question was presented to the county court, and that the judgment was rendered upon that point or question.

What then is this case? The prayer on the part of the appellants was, that the court would instruct the jury, that the appellees were not entitled to recover under the pleadings; not because there was a misjoinder of counts in the declaration, nor because one of the appellees was both a plaintiff and defendant in the action, but *because the debt was contracted for goods sold and delivered after the death of the testator.* Which instruction the court refused to give, but directed the jury, that they ought to find for the

appellees, if the goods were purchased by the appellants.

Now it may be, that the questions arising upon the misjoinder, and upon the circumstance that one of the appellees was both a plaintiff and defendant, (one or both,) were presented to the court. But whatever may have been the fact, it does not appear to us from any thing in the record, that either of them was presented to the court; and certainly they were not necessarily so presented. On the contrary, there appears to be a strong probability that they were not; and that the question on the misjoinder of counts in the declaration, had not presented itself to the counsel; or why was not the objection, to the right of the appellees to recover, placed directly upon that ground, instead of being placed in the prayer, upon the ground that the debt was contracted for goods sold and delivered after the death of the testator? From which it would seem, that the attention of the counsel had been drawn to the two first counts in the declaration, which are against the appellants, as executors of *Richard Grahame*; the first, as an indebtedness by the testator, for sundry articles properly chargeable in account; and the second, for goods sold and delivered to him in his life-time. On neither of which could there have been a recovery for goods sold and delivered to the appellants after the death of the testator. And hence would appear to have been the prayer for an instruction to the jury, that the appellees were not entitled to recover, *because* the debt was contracted for goods sold and delivered *after* the death of the testator; without adverting to the fact, or to the effect in law of the misjoinder. And the court seeing that the three other *counts* are against the appellants, in their individual capacities, may have decided on the prayer in reference to those counts, (upon which, if standing alone, the appellees would have been entitled to recover, for goods sold and delivered to the appellants,) without attending to the misjoinder, or to the position of one of the appellees, as both a plaintiff and defendant, or to the legal effect of either, if no question concerning them was presented to the court,



which does not *appear* to have been done. But rather, that the attention of the court was directed to another question, by the ground upon which the objection to the right of the appellees to recover, was placed by the prayer.

We should not therefore be at liberty, under the act of 1825, to reverse the judgment, on account either of the refusal by the court to give the instruction prayed, or of the direction that was given to the jury. The case of *Edelin vs. The State use of Jackson*, 4 Gill and Johns. 277, has been cited, to show that this case is not within the prohibition of the act of 1825, *ch.* 117; but there is an obvious distinction between that case and this. The action there was on an administration bond, to recover a distributive share of the estate of an intestate; and in the breach assigned in the replication, an inventory was alleged to have been returned by the administrator, and that after sundry disbursements made, there remained a certain balance of *that* inventory, in his hands for distribution; to a certain proportion of which, the plaintiff, as one of the distributees, was entitled, on which the issue was taken. And on that issue, the plaintiff was only entitled to recover a just proportion of what remained of that inventory, and nothing else; nothing else being claimed in the breach assigned. But there being negroes mentioned, and returned in the inventory, the plaintiff at the trial claimed to recover against the defendant, a proportion of the hire of the negroes also, over and above the amount of the inventory alleged in the replication, as returned and charged by the administrators in their accounts; the hire of the negroes not being so returned and charged; which claim, to charge the defendant beyond the inventory alleged in the replication, being objected to, the question, whether it was within the breach assigned, and could be recovered under the issue joined, appears necessarily to have been presented to the court. The claim was to charge the defendant with what was not contained in the inventory, nor assigned as a cause of action, and the objection was, that he could not be so charged.



The very claim and objection, therefore, of themselves raised and presented to the court, the question whether it could be done. That was the point to be decided. But not so here. The prayer in this case, does not of itself necessarily present any question in relation to the effect, either of the misjoinder of counts in the declaration, or of the fact of one of the appellees being both a plaintiff and defendant, on the right of the appellees to recover. But rather, as it would seem a question, as to the sufficiency of the proof to sustain the claim of the appellees, without reference to those technical objections, to which the attention of the court does not appear to have been necessarily drawn by the prayer, and apart from which the direction given to the jury was right. But the appellants proceeded to move court to *non pros* the action, *on the ground* that *Parran*, one of the appellees, was both a legal plaintiff, and a defendant on the record; which, according to the practice of this State, (a jury having been sworn) the court properly refused to do without the consent of the appellees; but proceeded to decide that the action might be sustained. In which we think the court clearly erred. A man cannot bring an action at law against himself. The same natural person cannot be both plaintiff and defendant on the record.

JUDGMENT REVERSED.

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DANIEL KENT'S ADM'RS vs. ROBERT B. WILKINSON.—  
*December, 1833.*

In an action of *assumpsit*, under the plea of limitations, the plaintiff proved, that the defendant, an administrator, in answer to a demand for payment, said, "he thought the debt had been paid, and he thought he could produce the receipts; if he could not produce the receipts, and it was correct, it should be paid." HELD, that it was incumbent on the plaintiff to prove the debt before he could avail himself of the promise.

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Kent's Adm'rs vs. Wilkinson.—1833.

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Whether, where there are two or more administrators, the promise of one, if absolute, is sufficient to take the case out of the act of limitations.—*Quere.*

*APPEAL from Calvert County Court.*

The appellee on the 4th of April, 1831, sued the appellants, *James Kent* and *Daniel Kent*, as admr's of *Daniel Kent*, in *Assumpsit*, to recover the value of certain services rendered to their intestate in his life-time, in August, 1827. The defendant pleaded *non assumpsit*, and limitations.

At the trial the plaintiff proved, that some time in the spring of 1830, the witness called on *James Kent*, one of the administrators of *Daniel Kent*, and presented him the account, on which this action is brought, and asked for payment thereof. The administrator observed he thought it had been paid, and he thought he could produce the receipts. If he could not produce the receipts, and it was correct, it should be paid. Upon this evidence, the plaintiff prayed the court to instruct the jury, that if they believed it, the plea of limitations was no bar to a recovery in this action. Which instruction, (KILGOUR, A. J.) gave, and the verdict and judgment being for the plaintiff, the defendants appealed.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Brewer* and *Stonestreet*, for the appellants.

1. The promise of *Kent*, the administrator, would not be sufficient to take the case out of act of limitations, even if the existence of the claim had been previously proved, which has not been done.

2. But the promise here, was conditional. It was to pay the account, if correct; and there is no proof of its correctness. It is like a promise to pay a claim, if it be proved; in which case proof of the claim is indispensable. *Blanch. on Lim.* 62. *Oliver vs. Gray*, 1 H. and G. 216.

*Boyle and Gill*, for the appellee.

1. The only condition annexed to the promise, is a condition which it was incumbent on the defendant to perform; it was to produce receipts. *Oliver vs. Gray*, 1 *H. and G.* 204.

2. The original indebtedness of the defendant's intestate, need not be proved. The proof offered was applicable only to the issue upon the plea of limitations; and that issue admits the original indebtedness, and places the defence upon the lapse of time. The original liability of the party then, being admitted by the plea; the promise shows it to be a subsisting liability. That is, it was acknowledged to be so, unless receipts could be produced.

MARTIN, J. delivered the opinion of the court.

The evidence contained in the bill of exceptions, in this case, is not sufficient to take it out of the statute of limitations. It is not an acknowledgment of a subsisting debt, nor an unqualified promise to pay it. At most, it is only a promise to pay if the plaintiff prove the debt to be correct; or in substance, prove the debt, and I will pay it; accompanied with a declaration that he believed the debt was paid.

It was incumbent on the plaintiff to prove the debt, before he could avail himself of the promise, in the manner he has attempted to do in this cause. *Oliver vs. Gray*, 1 *Harr. and Gill*, 216.

The court do not mean to express an opinion, that where there are two or more administrators, the promise of one, if absolute, is sufficient to take the case out of the statute of limitations. It is not necessary to decide that point in this case, as now presented; and not having been relied on in the argument, has not been considered by the court.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Wernwag vs. Pawling.—1833.

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LEWIS WERNWAG vs. JOHN M. PAWLING.—*December, 1833.*

The object of the 1st sect. of the 4th art. of the Constitution of the *United States*, in declaring, that full faith and credit should be given in each State, to the public acts, records, and judicial proceedings of every other State, when properly authenticated, was to give such acts, records and proceedings, full faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the State where they originated.

If a judgment is conclusive in the State where rendered, it is equally conclusive every where else. If re-examinable there, it is likewise re-examinable here. It is therefore, put upon the same footing as a domestic judgment, and the jurisdiction of the court pronouncing the judgment, is open, upon a proper state of the pleadings.

The *Pennsylvania* act of 1810, concerning arbitrations examined.

APPEAL from *Frederick County Court.*

This was an action of *Debt*, instituted by the appellee, against the appellant, on the 14th of March, 1829, upon a judgment obtained by the plaintiff, against the defendant, in *Montgomery* connty court, in the State of *Pennsylvania*. The declaration contained four *counts*, in each of which the judgment of the court in *Pennsylvania*, was averred to be, for \$215 88½.

It appeared from the record, which was admitted to be authenticated agreeably to the act of Congress, that the parties appeared by their attornies, on the day fixed by the rule for the selection of arbitrators, when they were chosen accordingly by their said attornies, and a time and place agreed on, for them to meet, and make their award. That the arbitrators reported their award, to the prothonotary of the court, in favor of the plaintiff, for \$215 88½, upon which a judgment was entered by him, as follows. "And now, to wit, December 24th, 1824, the said arbitrators report in favor of the plaintiff, \$215 88½. December 24th, 1824. *Judgment nisi.*"



By the record it also appeared that a *ca sa* and *scire facias* had been issued in *Pennsylvania* on this judgment, in each of which, it was recited to be for \$736. Issue was joined upon the plea of *nul tiel record*.

At the trial the plaintiff offered in evidence to the court the record of the judgment upon which the action was brought. The defendant objected to it as inadmissible, admitting however, that it was properly authenticated. This objection the court [SHRIVER and BUCHANAN, A. J's,] overruled.

The plaintiff then offered in evidence the act of assembly of the State of *Pennsylvania*, of the 20th of March, 1810. The defendant, waiving all objection to the book as evidence, opposed the reading of it to the court, as competent proof. This objection likewise was overruled by the court. The defendant excepted, and the judgment being against him, he brought the record by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and ARCHER, and DORSEY, J.

*James Raymond* for the appellant contended.

1. The judgment upon which this action was instituted, was either the judgment of a court of limited and special jurisdiction, or of a court of general jurisdiction exercising special powers; and in either case, it is necessary to show a strict compliance with the law, conferring the authority exercised. *Shivers vs. Wilson*, 5 Harr. and Johns. 132.

2. The act of assembly of *Pennsylvania*, is to be construed according to the rules of construction prevailing in our courts; and not according to the law of that State. If the construction put upon the law in *Pennsylvania* is relied on, it should be proved as a fact in the cause, in the usual way. *Brackett vs. Norton*, 4 Con. Rep. 517. *Andrews vs. Herriott*, 4 Cow. 525, note 6. To show how the arbitrators should have proceeded, he cited *Wickes vs. Caulk*,

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5 *Harr. and Johns*. 38. The arbitration system of *Pennsylvania* is not to be regarded with the same favor as ours; because there, either party may *compel* the other to submit to arbitration.

3. There is a variance between the declaration and record offered in evidence, in regard to the amount of the debt.

4. The judgment on the award was not properly entered. It is nothing more than a conditional judgment.

*Duckett* for the appellee, contended,

1. That at common law, the plea of *nul tiel record* puts in issue, and puts in issue only, the existence or operation of a judgment or record; but does not put in issue its validity. He referred to 2 *Saund. Plead. and Ev.* 315, 132. 1 *Chitty*, 481, 356. 1 *Saund. Plead.* 499.

2. That at common law, no objection to a judgment can be shown by pleading in a collateral action, the jurisdiction of the tribunal rendering the judgment, not being denied and disproved. And on this point referred to *Hayward vs. Ribbans*, 4 *East.* 311. *Cholmley vs. Veal*, 6 *Mod.* 304. *Campbell vs. Cumming*, 2 *Burr.* 1187.

3. That under the Constitution of the *United States*, the laws of Congress made in accordance therewith, and the decisions of Supreme Court of the *United States*, expounding and interpreting the same, the records and judicial proceedings of each State court, shall have such faith and credit given to them in every other State with the *United States*, as they have by law or usage in the courts of the State whence the said records are or may be taken; and that the State courts generally, if not universally, have recognized, and acted upon the foregoing principle. That is, that a judgment of a State court, if valid and binding in the State in which it is rendered, properly authenticated, shall be valid and binding in every other State of the Union. That such plea, and such plea only, shall be good and available against such judgment in every other State, as would be good and available if pleaded against such judgment in the

courts of the State in which the judgment has been rendered. Therefore, if the *Pennsylvania* record exhibits a judgment valid and binding upon *Wernwag*, in *Pennsylvania*, at the time of the commencement of the suit of *Pawling* in *Frederick* county court, then, the court of appeals of *Maryland* must recognize that judgment as equally valid and binding in *Maryland*, now. And if to the judgment exhibited by the *Pennsylvania* record, the plea of *nul tiel record* in a *Pennsylvania* court would not be regarded as a good and proper plea, and on such plea a *Pennsylvania* court would not declare the judgment a nullity; then, the court of appeals of *Maryland* cannot regard the plea of *nul tiel record* as a good and proper plea, and must not declare the judgment a nullity. He cited on this third point, *Constitution of the United States*, art. 4, sec. 1. *Act of Congress* of 24th May, 1790, vol. 1, 115. *Mills vs. Duryee*, 7 *Cranch*. 481. *Hampton vs. McConnell*, 3 *Wheat*. 234. 3 *Story's Com. on Con.* 181, 183. 1 *Kent's Com.* 243. *Benton and Burgot*, 10 *Serg. and Rawl.* 240. *Nixon vs. Young*, 2 *Yeates*, 156. *Borden vs. Fitch*, 15 *Johns. Rep.* 121.

4. He contended, that the judgment set out in the *Pennsylvania* record, is a valid and subsisting judgment against *Wernwag*, and in favor of *Pawling*, in the State of *Pennsylvania* at this time. *First*, that it is a valid and subsisting judgment in *Pennsylvania*, looking solely to the act of the 20th of March, 1810, construing that law, *proprio vigore*, and *per se*, without deriving any aid in its construction from the decisions of the courts of *Pennsylvania* upon that law, expounding and interpreting the law. And in support of that position, he referred to 10th section of the act the 20th of March, 1810, in *Purdon's Digest* of the laws of *Pennsylvania*. *Secondly*, on this point he contended, that the decisions of *Pennsylvania*, expounding and interpreting the act of the legislature of *Pennsylvania*, of the 20th of March, 1810, taken in connection with the *Pennsylvania* judgment, and the aforesaid last mentioned act of the



legislature of that State, go if possible, more conclusively to show, that the judgment is valid and binding in *Pennsylvania*, than the aforesaid act of Assembly does, considered in connection with the judgment independently of those decisions. And he referred in proof of this position, to *The Commonwealth vs. Lafitte and others*, 2 *Serg. and Rawle*, 106. *King vs. Sloan*, 1 *Serg. and Rawle*, 78. *Post vs. Sweet*, 8 *Serg. and Rawle*, 391. *Zeigler vs. Zeigler*, 2 *Serg. and Rawle*, 286. Upon this point he contended further, that notwithstanding foreign laws are to be proved as other facts ; and notwithstanding the laws of each State are to be regarded in every other State as foreign laws, and as such proved ; and notwithstanding the decisions of any State recognizing and declaring the existence of a State law, are not to be regarded as evidence of the existence of that law, where the law itself is either not proved or admitted on the trial ; still where the law itself is produced upon the trial, and its existence and validity admitted by the opposite party as in this case ; and where the question as in this case arises upon the proper construction of the law, the judicial tribunals of one State may look into the reported decisions of the judicial tribunals of another State in which the law exists in force ; not for the purpose of being conclusively bound by them, but as evidence of the construction which those tribunals have placed upon the law ; and that upon principles of comity, such reported decisions of a State court giving a construction to their own laws, are entitled to great consideration and high respect ; and unless clearly erroneous, should exercise a powerful agency upon the minds of the judges of another State court, in the formation of their decision upon the law, whose existence and validity are admitted.

He further contended, that the cases cited upon this point by the counsel for the appellant, do not conflict with the position last laid down ; because in those cases, the question was not, whether the reported decisions were evidence



of the construction, which the court passing those decisions gave to the law ; but whether those decisions were evidence of the existence of the law upon which they professed to decide. The law was not there as here incorporated in the record, or produced on the trial, and admitted by the opposite party to be a binding and subsisting law.

5. He contended that under the proof in the record, the courts of *Pennsylvania* would not sustain the plea of *nul tiel record*, and would not under such plea pronounce the judgment in question a nullity. 1. Because by the law and decisions of *Pennsylvania*, it appears that an award of arbitrators when entered upon the docket of the prothonotary, becomes, and continues to be a valid and subsisting judgment until reversed ; and that it can only be reversed in two ways, to wit, by appeal, or writ of error, neither of which have been resorted to. He referred to the *Commonwealth vs. Lafitte*, 2 *Serg. and Rawle*, 106. *Ebersoll vs. Krug*, 3 *Binney*, 528. *Studebacker vs. Moore*, 3 *Binney*, 126. *Sicard vs. Peterson*, 3 *Serg. and Rawle*, 468. *Lents and Stroh*, 6 *Serg. and Rawle*, 38. *Zeigler vs. Zeigler*, 2 *Serg. and Rawle*, 286. 2. Under this point he concluded, that an award of arbitrators although erroneous, cannot according to the decisions of *Pennsylvania*, be annulled collaterally in another action, while the judgment on it remains unreversed. And he cited *McPherson vs. Hamilton*, 2 *Yeates*, 40. *Hostetter vs. Kaufman*, 11 *Serg. and Rawle*, 147.

6. He contended, that even if the *Pennsylvania* judgment, for the purpose of obtaining its reversal, had have been attacked in the courts of *Pennsylvania* within the proper time, and in the proper manner, those courts could not have reversed and annulled, but would have confirmed and sanctified the judgment. In other words, that at whatever time, and under whatever circumstances, the regularity and validity of the *Pennsylvania* judgment might have been canvassed before the tribunals of *Pennsylvania*, those tribunals would have felt themselves constrained to pro-

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nounce the judgment, meritorious, regular, and valid, both by the *lex scripta* of their statute, and in analogy with their own decisions upon their arbitration system, settling its interpretation, and limiting and defining its extent and import. And he referred to *Thompson vs. White*, 4 Serg. and Rawl. 135. *Spangler vs. Rambler*, 4 Serg. and Rawl. 140. *Kimble vs. Sanders*, 10 Serg. and Rawl. 193. *Negley vs. Stewart*, 10 Serg. and Rawl. 207. *Boone vs. Reynolds*, 1 Serg. and Rawl. 231. *Oppenheimer vs. Comly*, 3 Serg. and Rawl. 3. *Bosler vs. Poe*, 13 Serg. and Rawl. 232.

7. That there was *no variance* between the judgment set out in the declaration, and the award of the arbitrators, resulting from the failure to declare in the declaration for the costs in the county court, ascertained by the prothonotary; because the award of the arbitrators does not embrace costs; and by the act of the legislature of *Pennsylvania*, the award of the arbitrators, and that alone, when entered on his docket by the prothonotary becomes the judgment of the court, and because that judgment in the language of the arbitrators is literally set forth.

8. He contended that the entry on his docket by the prothonotary, of the words “judgment *nisi*,” does not vitiate the judgment, which had been previously consummated by the entry by the prothonotary on his docket of the award of the arbitrators, in the language of the award. The act of *Pennsylvania* declaring that the *award* of the arbitrators, when entered upon the docket by the prothonotary shall from that moment become a binding judgment of the court, unless reversed upon appeal to be taken within twenty days from the entry of the award upon his docket by the prothonotary. That therefore, the words “judgment *nisi*,” are to be regarded either as surplusage, or as merely intended to indicate that the judgment, unless appealed from in twenty days, would become final and conclusive; and in either view these words are harmless; the judgment not having been appealed from within the twenty days, or at any time.

ARCHER, J., delivered the opinion of the court.

By the *first* section of the *fourth* article of the constitution of the *United States*, it is declared, "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and the congress may by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The object of this article of the constitution, was to give to such judgments, full faith and credit; that is, to attribute to them, positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated.

And congress, in conformity with the power conferred on the 26th of May, 1790, by their act passed on that day, declared that such records and judicial proceedings, authenticated as prescribed by the act, should have such faith and credit given to them, in every court within the *United States*, as they have by law or usage, in the courts of the State from whence the said records are, or shall be taken. If a judgment is conclusive in the State where rendered, it is equally conclusive every where. If re-examinable there, it is likewise re-examinable here. It is therefore put upon the same footing as a domestic judgment. 3 *Story on Const.* 183. *Mills vs. Duryee*, 7 *Cranch.* 481. 3 *Wheat.* 234. In *Mills vs. Duryee*, it is said, the only inquiry, where the suit is upon the judgment of another State, is, what is the effect of the judgment in the State where rendered. The question of jurisdiction of the tribunal pronouncing the judgment, is however, also examinable; for if the tribunal had no jurisdiction, the judgment would be a nullity every where. 4 *Cowen*, 294. 15 *Johns* 141.

The question then, of the jurisdiction of the court pronouncing the judgment, would be open for inquiry, on a proper state of pleadings. Without however stopping to enquire, whether that question could properly be raised on the plea of *nul tiel record*, and on the bare offer to introduce



the copy in evidence ; we shall proceed to inquire, whether there was a defect of jurisdiction, and if there was not, whether the proceedings are with proper precision, specially set forth, without any examination of the legal necessity, for so specially setting them out.

And here it may be remarked, that a resort to the decisions of the courts of *Pennsylvania*, upon all the objections, both as to jurisdiction and the necessity of specially setting out all the proceedings, to give validity to the judgment, would conclusively show, that the various points raised by the appellant, in relation to these matters, could not be sustained in any tribunal of that State. 1 *Serg. and Rawl.* 78. 2 *Ib.* 106. 8 *Ib.* 391. 3 *Ib.* 468. 6 *Ib.* 38. 4 *Ib.* 140. 10 *Ib.* 193, 207. 1 *Ib.* 231. 3 *Ib.* 3. 13. *Ib.* 231, 232. 3 *Binney*, 528, 126.

But on the concession, that these decisions not having been proved as facts, could not be judicially noticed, and that they could legitimately have no other effect, than the determination of any other learned tribunal, which might be called on, to aid us in the construction of the act of assembly of *Pennsylvania*, (a question we do not mean to decide,) we shall proceed to examine the act referred to.

The law was passed in 1810, and is entitled “an act concerning arbitrations.” Its object and design was, to enable either party to coerce an arbitrament of his case, without, and even against, the consent of the opposing party.

In ordinary cases, four things appear to be necessary to be done, before the jurisdiction attaches.

1. That there should be a rule of reference.
2. The appointment of arbitrators and notices as required by the law.
3. Residence of the arbitrators.
4. That they be sworn or affirmed.

The first and fourth requisites appear to have been complied with. The rule of reference was strictly in compliance with the act, and it appears by the return of the arbitrators, that they were sworn, or affirmed ; and as by



the act, they possessed power to qualify each other, their certificate is amply sufficient to establish that fact. The second and third requisites, although necessary to confer jurisdiction in ordinary cases, occurring under the law, cannot be required here.

It is averred in the record, that the parties met in the prothonotary's office, and *agreed* upon the arbitrators to decide their cause; and as appears from the record, being both present, when the time and place of meeting was fixed by the officer, the notices demanded by the *first* and *eighth* sections, were entirely unnecessary, either to be proved or shown. Nor was it necessary it should appear, that the arbitrators resided in the county where the reference was made, for it was competent undoubtedly for both parties to agree upon the arbitrators, without reference to their residence; and having so agreed, they ought not to be heard to say, that they were not qualified to act for want of residence; or because it did not appear where they resided.

It is manifestly unimportant, at what period of time the award was returned; for the 25th section of the act, making it their duty to return the award within a specified time, was not intended to affect the validity of the award, but only their compensation, which for their trouble they should receive, and operated in the nature of a penalty upon them, for a failure to comply with the requisitions of the act.

From these considerations it appears, that the jurisdiction of the arbitrators attached, and that every thing has been set out in the proceedings, which it was necessary to show, to give them validity.

The award being thus returned to the office of the prothonotary of the court of common pleas, it became a judgment of that court, entitled to all the consideration, and conclusive character, which any other rendered in that tribunal could have, unless indeed, as has been contended, it be considered, from the entry of *judgment nisi*, as a mere conditional judgment. But it ought not to be thus viewed.

For the 11th section points clearly to the meaning of the entry *judgment nisi*. It is to become an absolute judgment, unless an appeal be entered, and unless bail and recognizance be entered into within twenty days thereafter; for the law directs that unless such bail be given, execution may issue on such judgment. That this became a judgment of the court of common pleas, after the entry of judgment by the prothonotary, has been decided in 3 *Binney*, 228, and in this decision we entirely concur. It is called a judgment in the law, and has all the attributes of a judgment imparted to it. It is a lien on the lands of the defendant, and its fruits may be reaped by an execution issued from the court of common pleas. And that tribunal would have all the power over such process, which it would have over any other process of execution, issued upon any other judgment by them rendered; which power could scarcely have been conferred, had not the law makers considered it a judgment, and a judgment of that court also. That the judgment may in many cases be entered by the prothonotary, while the court of common pleas was not in session, could scarcely be considered as bearing on this enquiry. The clerks of our own courts, by the law of 1801, *ch.* 70, *sec.* 17, were permitted to enter judgments on the fiat of a judge, but they were not certainly on that account, the less entitled to the appellation and dignity of judgments of the county courts.

Considering the judgment as one of the court of common pleas, no objection to the jurisdiction of that tribunal has been taken, unless indeed, the objection which has been examined in relation to the arbitration. But it is supposed, that there exists a variance between the record of the judgment, and its statement in the pleadings. It would indeed appear, from looking at the *ca. sa.* and the *sci. fa.* which were issued on this judgment, that it had been for a greater sum than that stated in the *nar.* But we cannot look to these, to determine the extent of the judgment.

From the record of the judgment it would appear, that

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it had been rendered for the sum stated in the award of the arbitrators, which corresponds with the sum averred.

The variance between the writ, and the record offered in evidence, as to the amount of the judgment, could not certainly on this issue be taken advantage of, and could furnish no objection to the admissibility of the record in evidence.

JUDGMENT AFFIRMED.

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**BUTLER and BELT vs. THE STATE, use of CONTEE and BOWIE.—December, 1833.**

In an action of debt on a bond, where the original bond is filed with the clerk of the court, and there to remain and become a public record, as in the case of a trustee's bond, given in pursuance of a decree of a court of equity, the plaintiff is not in legal contemplation in the possession of the original bond, nor required to make a profert of it.

Where profert is made in such a case, it does not impose on the plaintiff, the obligation to produce the original bond, either upon *oyer* craved, or upon the trial of the issue of *non est factum*; a certified copy is sufficient.

In ordinary cases, upon the trial of issue joined upon the plea of *non est factum*, the plaintiff is bound to produce the original bond, with or without *profert* made in the declaration.

The legal effect and operation of a bond, is matter of law to be decided by the court, and not a fact to be submitted to a jury.

Upon the trial of the issue joined upon *non est factum*, it is the province of the jury to find whether the bond declared on, was in point of fact executed by the defendant.

In an action of debt on a bond given by a trustee, appointed by the court to sell real property, the condition of which was to perform the duties required by the decree under which he was appointed, and any future decree in the premises, the replication to the plea of performance, assigned as a breach, that after the sale and receipt of money by the trustee, an audit was made and ratified by the court upon the 29th July, 1831, and the trustee thereby ordered to pay over to the plaintiff the sum due him by the audit, which he refused to do, &c. To this the defendant rejoined, that on the 17th December, 1830, his appointment as trustee was revoked. The court sustained the plaintiff's demurrer to the rejoinder, and upon execution of a writ of

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enquiry, refused to permit the defendant to show in mitigation of damages, either that he had not received money enough to pay the plaintiff's claim, or that upon the revocation of his appointment, he had paid the balance in his hands to his successor, also appointed by the court.

Evidence cannot be permitted to go to a jury, the necessary effect of which is to reverse a decree of a court of equity, solemnly, absolutely and judicially pronounced, and which can only be re-examined upon appeal, re-hearing, or bill of review.

In an action on a trustee's bond conditioned to perform the decree of a court, upon the trial of the issue joined upon *non est factum*, the original bond being mislaid, the plaintiff produced a copy duly certified by the clerk of the court, and the defendant produced another certified copy varying from the first—the county court instructed the jury, that they ought to be satisfied by the evidence, that of the varying copies, that produced by the plaintiff is the one, which truly states the date of the bond alleged to have been executed by the defendants, and truly recites the decree.

PER PRINCE GEORGE'S COUNTY COURT.

### APPEAL from *Prince George's County Court*.

This was an action of *Debt* instituted by the appellee, against the appellants, and one *E. M. Dorsey*, on the 30th of July, 1831, on a bond, bearing date the 7th of August, 1830, in the penalty of \$5000, with the following recital and condition. "Whereas by a decree of *Prince George's* county court, bearing date the 27th day of July, 1830, the said *Edwin M. Dorsey* was appointed trustee, to sell certain real estate, the property of a certain *Walter B. Brooke*, contained in a mortgage from him, to a certain *Lucy S. Brooke*, for the purpose of paying the said mortgage debt. Now the condition of the above obligation is such, that if the above bound *E. M. Dorsey*, trustee as aforesaid, do and shall well and truly perform the duties required by the said decree, or which may be required by any future decree or order in the premises, then the above obligation to be void, else in full force, &c."

The plaintiff's declaration made *profert* of the original bond. The defendants craved *oyer*, and pleaded *non est factum* and performance; on the prayer of *oyer*, the defendants produced a certified copy of the bond from the clerk's office.



Issue was taken by the plaintiff, to the plea of *non est factum*; and in his replication to the plea of performance, after setting out the proceedings of the trustee under the decree, up to the period of the ratification of the sale, which amounted to \$11,000, of which as averred, the trustee had received \$7,000, the plaintiff avers, "that on the 7th of January, 1831, it was ordered by said court as a court of equity, that the auditor be directed, as soon as possible, to audit the claim (being a judgment debt) of the said *Wm. D. Bowie* and *John Contee*, against the estate of the said *Walter B. Brooke*." That this was accordingly done; and "that on the 11th of January, 1831, the auditor reported to the said court, that the said *Bowie* and *Contee*, were entitled to be paid the said judgment, amounting to the sum of \$1299 16 1-3, out of the proceeds of the estate of the said *Walter B. Brooke*," which report on the 26th of July, 1831, was duly ratified and confirmed by the court; and it was further ordered, "that the said *E. M. Dorsey* be, and he was thereby directed and required, to pay over to the said *Wm. D. Bowie* and *John Contee*, the amount appearing to be due them, by the said report of the auditor," which he failed to do, &c.

The rejoinder to this replication alleged, that before the last mentioned order was passed, to wit, on the 17th of December, 1830, the said court by its order of that date, revoked the appointment of said *Dorsey* as trustee, and appointed another; so that his authority and power as trustee, and all liability for him as such, on the part of the appellants ceased.

The plaintiff demurred to this rejoinder. 1. Because it did not answer the replication. 2. Because the traverse presented by it was immaterial, and improper. And, 3. Such as no issue could be taken upon. The court [STEPHEN Ch. J.,] ruled the demurrer good; and there was a verdict for the plaintiff upon the plea of *non est factum*.

1. At the trial the plaintiff offered in evidence a paper,

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purporting to be a certified copy of an original bond, having the signatures thereto of the said defendants, which original, one of the deputy clerks proved, was filed in the clerk's office, among the papers in the case of *Lucy S. Brooke vs. Walter B. Brooke*, on some day between the 27th July, and 15th September, 1830, but by whom filed, or brought to the office, the witness did not know. It was further proved by another clerk, that the copy now produced, was copied by him from the original bond. The witness also proved, that he often saw the original bond in the office, until some time in *January* last, when it was searched for, and could not be found. That at first he supposed it had been mislaid by the auditor, or by one of the counsel in the cause, each of whom had the papers out of the office, and that it would be returned; but finding that not to be the case, he has since, frequently and diligently searched throughout the office, without being able to find it. The clerk who wrote the certificate, annexed to the copy offered by the plaintiff, proved on cross examination, that the said certificate was written a few days ago, and that he did not examine said copy, or compare it with the original, but added the certificate because he saw it attested as a true copy by one of the clerks in the office. The plaintiff further proved by the executor of the auditor, in whose hands the papers had been placed, that he had diligently searched among the papers of his testator, for the bond referred to, but could find no such paper. He likewise proved, that a bond in the same penalty as the one declared upon, and signed by said *Dorsey* and the appellants as his sureties, was on the 8th of September, 1830, given by said *Dorsey* to the witness, to be taken to the chief judge of the district for his approval. That the witness accordingly on that day presented it to the judge, who approved the same, and that on the evening of the same day, he returned the said bond to *Dorsey*, so approved. The counsel in whose hands the papers in the chancery case were proved to have been, proved, that he had no recollection of

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Butler and Belt vs. The State, use of Contee and Bowie.—1833.

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seeing the bond in question, among them; but that he is confident he returned all the papers he received from the office.

Upon the foregoing evidence, the defendants prayed the court to instruct the jury, that the plaintiff was not entitled to recover. This the court refused, and instructed the jury as follows.

The court is of opinion that under the act of 1785, *ch.* 72, a certified copy of a bond stands in the place of the original, and is sufficient to maintain the plaintiff's suit, and upon *oyer* craved, to comply with such prayer. That the copy now produced, being certified by the clerk to be a true copy, is a compliance with the act of Assembly, so as to enable the plaintiff to maintain an action upon it. By the prayer of *oyer* in this case, the bond became spread upon the record, and became a part of the plaintiff's declaration. The plea of *non est factum*, in legal effect and operation, denies that the defendants executed any such bond, as that upon which the plaintiff has declared, and upon issue joined upon such plea, the question for the jury will be, whether the defendants executed a bond, of the same legal effect and operation, with that so spread upon the record. There is no doubt, that delivery is essential to the legal validity of a bond; and the court is of opinion, that the bond in this case, being executed by the sureties to enable the principal to act as trustee, as soon as it was signed and sealed by them, and delivered to him for that purpose, it became binding upon them, provided he thought proper to avail himself of it, by having it finally consummated, by procuring the necessary approval, and the possession of the 8th of September was evidence of such delivery. Upon such approval the bond became legally obligatory, because upon being so approved, the act of Assembly recognizes and speaks of it as a bond, by saying it shall be lodged with the register. The court also think, that there is sufficient evidence of the loss of the bond, to let in secondary proof, and that the copy offered in this case, is sufficient *prima facie* evidence



to go to the jury, to prove the contents of the bond, if the jury find from the evidence under the plea of *non est factum*, that the original was executed by the defendants. The court is also of opinion, that if the original was in existence, it ought to be produced and proved in the ordinary way; but being lost, secondary evidence of its contents is admissible. The defendants excepted.

2. The defendants then read to the jury two copies of the bond on which this action is brought, different in some respects from the copy produced by the plaintiff, and prayed the court to instruct the jury, that the said papers, and each of them, equally purported to be copies of the same original bond, and imported verity; and that it is incumbent upon the plaintiff, to prove to the satisfaction of the jury, that the paper so as aforesaid offered by him, is the true and genuine copy of the original bond upon which he seeks to recover, and that the other papers are not such true and genuine copies. That the paper declared on, must be substantially and identically the same with that proved. This instruction the court refused to give, being of opinion, and so instructing the jury, that it was incumbent on the plaintiff to prove to their satisfaction, that the bond offered in evidence by him, was in *legal effect and operation* the same as the bond executed by the defendants. The defendants excepted.

3. The defendants further prayed the court to instruct the jury, that it is incumbent on the plaintiff to satisfy them, that the copy of the bond produced by him stated truly the date of the bond, alleged to have been executed by the defendants; and also that it recites truly the substance of the decree it refers to, and if the jury cannot be satisfied by evidence, which of the various copies, differing in these respects from each other, is the true copy, they ought to find for the defendants.

The court refused to give this instruction, and directed the jury, that they ought to be satisfied by the evidence, that of the varying copies, that produced by the plaintiff is



the one that truly states the date of the bond, alleged to have been executed by the defendants, and truly recites the decree. The defendants excepted.

4. In addition to the evidence offered in the preceding bills of exceptions, which are made a part of this, and when the plaintiff was about to execute a writ of enquiry at bar, the defendants for the purpose of mitigating the damages, or reducing the plaintiff's claim, offered to prove to the jury, that the trustee, *E. M. Dorsey*, did not receive in the character of trustee, a sufficient amount of money to pay the plaintiff's claim, but before he had done so, another trustee had by the authority of the court been substituted in his place, by whom the balance of the money had been received. This evidence the court would not permit to go to the jury, upon the ground that the proof so offered was not within the issue. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and DORSEY, J.

*Johnson* for the appellants.

1. The plaintiff having declared upon and made profert of the original bond, was bound to produce it to sustain the issue, upon the plea of *non est factum*. *Act of 1785, ch. 72, sec. 10. Smith and others vs. Woodward, 4 East. 585. 1 Chitty Pl. 350. 2 Stark. Ev. 475.* The act of 1785, does not dispense with the necessity of producing the original bond. If it did, the defendant would be denied altogether the advantage of the plea of *non est factum*, for if a certified copy is evidence for the plaintiff, in opposition to that plea, it is from the very nature of the case conclusive. The whole effect of the act is to do away with the necessity of making profert of the original bond, and the plaintiff instead of making profert of the original, ought to have declared upon and made profert of a copy, with an excuse for not

producing the original; and the defendant has a right to traverse the fact, that the original is on file in the office; and consequently, the fact that it is on file, should be alleged in the declaration, that the defendant may take issue upon it. The opinion of the court in this exception is erroneous, in submitting to the jury the legal effect and operation of the bond, which is a mere question of law, and should have been decided by the court.

2. The second exception is obnoxious to the same objection.

3. The third exception is submitted without argument.

4. The evidence offered upon the execution of the writ of enquiry in mitigation of damages, ought to have been received. It was admissible under the issue to the replication, to the plea of performance. The rejoinder to this replication alleges, that another trustee was appointed before all the money was received. A plea in bar could not have been filed, because a part had been received, and the question raised by the rejoinder was, whether that part was sufficient to pay the plaintiff's claim. It is very possible, that all the money received by the trustee, may have been absorbed in paying the mortgage debt.

*A. C. Magruder*, for the appellee.

1. The bond being in the custody of the clerk, could not be procured by the plaintiff; of course he was not bound to make proof of it, and his doing so was superfluous and unnecessary. 1 *Chitty Pl.* 350. But if the objection is good at all, it should have been by special demurrer.

2. The court did not leave a question of law to the jury. It expounded the law, and submitted the fact.

3. The evidence offered upon the execution of the writ of inquiry, was not within the issue. But the order of the 26th July, 1831, is peremptory upon the trustee to pay the money; and that order being unrevoked, cannot be disputed in this action.

DORSEY, J., delivered the opinion of the court.

The court below could not have done otherwise, since the act of assembly of 1825, than reject the appellant's prayer, in their first bill of exceptions; it being a general prayer, that the plaintiff was not entitled to recover. But having proceeded at some length to express their opinion, upon the effect of producing a certified copy of the bond, on the prayer of *oyer* by the appellants, it is alleged that the plaintiff, in his declaration, having made profert of the original bond, he is therefore bound to produce it, on the prayer of *oyer*, and on the trial of *non est factum*, and that the court erred in not so instructing the jury. To sustain this objection, 1 *Chitty Pl.* 350. 2 *Stark. Ev.* 475, and *Smith and others vs. Woodward*, 4 *East.* 585, have been referred to. These authorities are not applicable to the case at bar. There the plaintiffs were bound to have made profert of the original bonds; and having done so, the original bonds, from the time of the profert, are presumed to remain in court subject to the prayer of *oyer*; and must be forthcoming at the trial of the issue of *non est factum*. But here, the original bond being filed with the clerk of *Prince George's* county court, there to remain and become a public record, could not in legal contemplation be in the possession of the plaintiff, or be the subject of a *profert*. The mere fact of *profert* therefore, imposes on the plaintiff no obligation to produce the original bond, either upon *oyer* craved, or upon the trial of the general issue. Upon the latter issue, his obligation to do so is equally imperative, with, or without *profert*. It is indeed an unnecessary nugatory offer on his part, which is to be rejected, as *surplussage*. 1 *Chit. Pl.* 314, and the cases there referred to.

A second objection has been raised to the opinion of the court below, because they instructed the jury, that the question for their decision was, "whether the defendants executed a bond of the same legal effect and operation, with that so spread upon the record." And this objection we think well founded.



The legal effect and operation of the bond was matter of law to be decided by the court; not of fact, to be found by the jury. It was their province to find whether the bond declared on, was in point of fact executed by the defendants. Its legal efficacy was matter of construction to be left for the court to pronounce. The same objection is taken to the court's instruction in the second bill of exceptions, and we sustain it for the same reason.

The third bill of exceptions is waived by the appellants.

The county court was right in rejecting the testimony offered by the defendants in their fourth bill of exceptions.

The question on which it was offered, was not open for consideration by the jury. It was adjudicated by the county court, as a court of equity, in their peremptory order on *E. M. Dorsey* the trustee, to pay over to the real plaintiffs in this action, the sum of money stated by the audit then confirmed, to be due them; and for the recovery of which the present action was instituted. To have admitted the testimony would have been to constitute the jury an appellate tribunal to reverse the order or decree of the county court long antecedently, solemnly, and judicially pronounced, when sitting as a court of equity. It was correctly said therefore by the learned judge, who tried this case, "that the proof so offered was not within the issue."

The condition of the bond given by the defendants is, "that *E. M. Dorsey*, as trustee as aforesaid, do, and shall well and truly perform the duties required by said decree, or which may be required by any future decree, or order in the premises." The breach assigned, is the non payment as directed by the order of the county court. After the issue of *non est factum* had been found for the plaintiff, the only questions open to the jury of inquest, were, did the court pass such order? Had payment been made conformably thereto?

The justice and legality of the order, could not have been a subject of enquiry, in the trial of this cause in the



court below. They were questions not examinable, when thus indirectly and collaterally presented ; but could only be re-examined, and re-adjudicated, by a direct appeal from such order to this court ; or on a rehearing, or bill of review, before the same tribunal by which the order was passed. This is not the common place order of a court of equity, ratifying the auditors statement, or the report of sales by a trustee, whereby, “the trustee is directed to apply the proceeds accordingly,” (which order only binds the trustee to pay, when the proceeds of sale are by him received,) but it is an absolute order to pay ; and in effect, an adjudication of the court, that the trustee has that amount of the proceeds of sales in his hands, applicable to the payment of that order.

We concur with the county court on the fourth exception, but dissenting from them in the first and second bills of exceptions, we reverse their judgment.

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5. So where there was a misjoinder of causes of action in the plaintiff's declaration, some being against the defendant in one character, and some in another, and the defendant at the trial moved the county court to instruct the jury, that the plaintiff cannot recover, because it was for a debt contracted for goods sold since the death of the defendant's testator, and the court refused the direction prayed for, and instructed the jury, that if they believe the defendant purchased the goods charged, they should find for the plaintiff; the defendant upon appeal cannot insist upon the misjoinder of counts as ground of reversal, but must be confined to the question presented to and decided by the county court, and which assumed there was but one class of counts in the declaration. *Ib.*

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See Sales of personal property, 1, 2, 3, 4.

CITY OF BALTIMORE.

1. By the act of 1784, ch. 62, it was declared, that, &c. shall have power and authority to build and erect a market house on a parcel of ground, situate in the town of *Baltimore*, opposite *Harrison street*, beginning in *Baltimore street* and running thence S. of the width of 150 feet to *Water street*, with the privilege of extending the same to the channel; and that the market house, when erected, and the ground whereon the same shall be built, with the privilege aforesaid, shall be vested in the commissioners of *Baltimore town*, and their successors. In pursuance of this power a market house was built to *Water street*. The space south of the market house to the channel was a continuous marsh, covering the width of 150 feet. D and M owned lots on the east and west of the space adjoining the same, and extending south to the waters of the harbor of *Baltimore*. In 1794 they applied to the commissioners of the town of *Baltimore* for permission to make a canal and wharf, at their own expense, in the market space, from the south side of *Pratt street*, (which was in fact the south side of their own lot) to the channel or warden's line of the basin of *Baltimore*. The canal to be 80 feet wide, and with streets on each side of the same. The canal, wharf, and streets, to be made public for the use of the inhabitants, under the laws and regulations of the Board of Commissioners; and to be relinquished up to the com-

missioners whenever the same, or any part thereof, might be wanted for market houses. The Commissioners granted the request, with the declaration "that the privilege of filling up the canal, and of the whole space of 150 feet wide, be fully reserved to the commissioners and their successors, for the use of the town according to the act of 1784, ch. 62—and that the canal, wharves and streets on each side of the canal, be a common highway, and free for the public use, and subject to such regulations as the commissioners and their successors shall, from time to time, establish; and that D and M extend *Pratt street* through their lots of ground on each side of Market space, and leave *Pratt street* through those lots forever as a street for the public use." Under this authority D and M opened *Pratt street*, and made fast land from *Water street* south to the channel, and built a canal or dock with the streets adjoining, as contemplated. After this, both the corporate authorities and D and M claimed to collect wharfage from vessels using the dock—and upon cross bills filed, it was held.

- (1.) That the act of 1745, ch. 9, sec. 10, which declared "that all improvements of what kind soever, made out of the water, shall, as an encouragement to such improver be forever deemed his inheritance," did not apply to this case—That the improvement in front of the market house lot was not such a one as was justified by the act of 1745.
- (2.) That the entire parcel of ground from *Baltimore street* to the channel, 150 feet in width, by the act of 1784, ch. 62, was vested in fee in the town Commissioners and their successors, with power to reclaim the marsh for the convenience of persons frequenting the market house.
- (3.) That it was not the design of the commissioners to give D and M any right of property in the proposed improvement, and that they have no right to wharfage.
- (4.) That the improvements, when made by D and M vested in the town commissioners, in the same manner as they would have done if made by the commissioners, and

that therefore, the corporation of the city of *Baltimore* had the right to collect wharfage from persons using the dock in question.

- (5.) Over wharfage collected at private wharves, or wharves other than those owned by the town or city of *Baltimore*, or made at the ends or sides of public streets, lanes or alleys, the town or city officers have no control. Its imposition and collection is the exclusive privilege of the wharf owners. It is otherwise with wharfage collected at wharves owned by the town or city, or at the ends or sides of the streets, lanes or alleys; all these are called public wharves. *Dugan vs. the Mayor and City Council of Baltimore.* 357

2. The act of 1817, ch. 148, so far as regards the power of the *Mayor and City Council of Baltimore*, to pass ordinances for the prevention and extinguishment of fires, does not extend the previous powers conferred by the original charter of that city upon that subject. *Glenn vs. Mayor and City Council of Baltimore.* - - - - - 424

3. Where an ordinance of the city of *Baltimore*, does not in terms disclose that it is in the fulfilment of some one of the specific powers granted by the charter of that city, or it is not so connected by its subject matter with the powers conferred, that the court can judicially determine it to be made in the exercise of its chartered privileges, it becomes a question of fact, whether such ordinance was properly passed or not; and the burthen of proof is upon the party claiming under it. - - - *Ib.*

4. So where an ordinance prohibited the carrying on any distillery of spirits of turpentine or varnish, and did not purport to be passed for the prevention of fires, the court HELD, they would not judicially determine whether such prohibition was calculated to prevent danger from fires, but referred it to a jury to determine whether it was in any degree calculated to effect that object. - - - - - *Ib.*

5. The ordinance of March, 1826, passed by the corporation of *Baltimore*, prohibiting the erecting, establishing, or rebuilding of certain factories within the limits of direct tax-

ation in said city, was not intended to interfere with any then existing establishment, nor to prevent its being merely repaired; and where one of such factories was injured by fire, and its business stopped, it becomes a question of fact whether it was rebuilt or repaired. If the destruction was so great as to require the house in which it was carried on to be rebuilt, it must then come within the prohibition. *Ib.*

#### CONDITION PRECEDENT.

*See* Covenant, 1, 2, 3.

#### CONDITIONAL SALE.

*See* Mortgage, 3, 4, 5, 6, 7.

#### CONSTITUTIONAL LAW.

1. The object of the 1st sect. of the 4th art. of the Constitution of the *United States*, in declaring, that full faith and credit should be given in each State to the public acts, records, and judicial proceedings of every other State, when properly authenticated, was to give such acts, records and proceedings, full faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the State where they originated. *Wernwag vs. Pawling,* - - - - - 500
2. If a judgment is conclusive in the State where rendered, it is equally conclusive every where else. If re-examinable there, it is likewise re-examinable here. It is therefore, put upon the same footing as a domestic judgment, and the jurisdiction of the court pronouncing the judgment, is open, upon a proper state of the pleadings. - - *Ib.*

#### CONSTRUCTION.

*See* Award, 1, 3.

— Covenant, 1, 2.

— Mortgage, 11.

#### CONTRACT.

*See* Court of Chancery, 11.

— Covenant, 1, 2.

— Principal and Agent, 1 to 7.

— Surety, 1, 2, 3.

#### COSTS.

*See* Court of Chancery, 10.

## COURT OF CHANCERY.

1. Courts of Chancery in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor. *Lee and Wife and Jordan vs. Stone & McWilliams*, - - - 1
2. In Chancery, acts done *bona fide*, for the doing of which an order would on application have been passed as a matter of course, shall be regarded in the same light, as if emanating from an order previously obtained for that purpose. *Ib.*
3. A vendor of land, in equity, seeking to enforce his lien for a balance of purchase money by a re-sale, cannot require the court to tack to his lien another debt, to the exclusion of a judgment creditor who has a constructive lien upon the same land. - - - - *Ib.*
4. A mortgagor who goes into Chancery to redeem, will not be permitted to do so, but upon payment not only of the mortgaged debt, but of all other debts due from him to the mortgagee. - - - - *Ib.*
5. But if a mortgagee seeks a foreclosure in Chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only; and if a subsequent mortgagee or judgment creditor, files a bill to redeem, he will be permitted to do so, upon the payment of the mortgaged debt alone. - - - - *Ib.*
6. The real estate of I, a deceased insolvent, was sold under a decree for the payment of debts, to B. This sale was regularly confirmed. B not having paid the *entire* purchase money, the land was re-sold, and certain judgment creditors of his, who alledged his death, and that his personal estate was sufficient to pay his debts, claimed the payment of their demand out of the balance in the trustee's hands after satisfaction of the original purchase money. This application was opposed by the heirs at law of I, who were minors at the time of the first sale, but whose guardian, (for whom B was security) had received and wasted a large amount of the first purchase money, and who claimed the balance arising from the second sale in preference to the judgment creditors of B. The Chancellor confirmed the auditor's accounts, awarding a payment to the judgment creditors, and his decree upon appeal was affirmed. - - - - *Ib.*
7. An action at law will not lie to enforce a decree in Chancery, within the territorial jurisdiction of the Chancery Court. *Jones vs. Cox*, 65
8. Lapse of time may operate as a bar to a decree to account. In equity, laches and neglect are discountenanced; this tribunal only lends its power to reasonable diligence. *Steiger's Adm'rs vs. Hillen*, 121
9. At law, a widow cannot recover damages against the alienee of her husband from his death, but only from the time of demand and refusal to pay her for, or assign her dower. The feoffee was not in default until that time. The same rule must prevail in equity under the same circumstances. Where she makes no demand before her death, her claim to rents and profits is gone. *Ib.*
10. Where a complainant applies to a Court of Chancery for an injunction to preserve property mortgaged to him, from waste, destruction or removal, which he has sufficient reason to apprehend will occur before he has a right to proceed upon his mortgage for a sale or foreclosure, he is entitled to costs, upon the final decision of his cause. *Clagett, et al. vs. Salmon*, 314
11. At law, if two persons be bound jointly and severally, and the obligee releases one of them, both are discharged, yet equity will not give a release or operation beyond the intention of the parties, and the justice of the case. - - - - *Ib.*
12. Rules of pleading in equity are not to be governed by the same technicality as to matters of form, that controls proceedings at law. Courts of equity look to substance, not form. *Birely & Holtz vs. Staley*, 432
13. One creditor may proceed in equity to vacate conveyances void under the statute of *Elizabeth*, and if successful, the fund arising from the sale of the property covered by them may be retained in court until the other creditors are notified to come in, and assert their claims to participate. - - - - *Ib.*



14. It is a general principle, that where a creditor seeks the aid of a court of equity to pursue property fraudulently conveyed away, a judgment must be first obtained against the debtor, before his lands fraudulently granted can be reached; in such a pursuit against personal property, a *fi fa* also must first have been issued: but where the debtor died after suit brought at law, and before judgment, and the answer set up no such defence, this principle does not apply. - *Ib.*
15. Where creditor's claims to relief rest upon liens to be acquired through judgment or execution, it follows as a necessary consequence that out of the fund pursued, if land, they must be paid according to the seniority of their judgments; if personal property, according to their respective priorities acquired by the delivery of their several *fi fa*'s to the sheriff. - - - - *Ib.*
16. But a court of equity in *Maryland* would not give any such priority to a creditor who had judgment merely against an administrator of his debtor. All creditors without judgment in the life-time of the fraudulent grantor would come in *puri passu*. - - - - *Ib.*
17. Where a court of equity is satisfied from the facts in the cause, that a deceased debtor left no personal estate to be administered, they will not require letters to be taken out, or proceedings against an administrator to be shown, though under other circumstances, such measures might be deemed necessary to make proper parties to the suit. - *Ib.*
18. To prevent a court from vacating a conveyance made to hinder and delay creditors, on the ground that the grantee had sufficient property independent of that conveyed to pay his debts, it must appear, not only that it was sufficient to pay the complaining creditor, but all the grantor's creditors. - - - *Ib.*
19. A deed otherwise void under the statute of *Elizabeth*, cannot be sustained on the ground of a secret, or oral contract between grantor and grantee, that the property conveyed should be held in trust for the benefit of all the creditors of the grantor. A secret contract so made could not be enforced either at law or in equity, at the suit of the grantor or his creditors. *Ib.*
- See Action—Right of, 2, 3.  
 — Donation, 1, 2, 3, 4.  
 — Dower, 1.  
 — Evidence, 28, 29.  
 — Insolvent Debtor, 3.  
 — Mortgage, 3, 4, 6, 8, 11, 12.  
 — *Ne Exeat Regno*, 1, 2, 3.

## COVENANT.

1. Whatever may have been the principles contained in the more ancient decisions, upon the legal effect and operation of contracts containing various covenants, the strong bearing of the courts in more modern times, has been to disencumber themselves from the fetters of technical rules, and to give such a rational interpretation to contracts, as will carry the intention of the parties into full and complete operation. *Watchman & Bratt vs. Crook, et al.* - - - 239
2. W contracted with C by an agreement under their seals, that he would furnish materials, and construct, and put up for C, a high pressure steam engine of certain specified proportions and power,—“the whole to be finished, and delivered at the factory of C, and there properly fitted up, and put into effective operation by and at the charge of W, within 90 days from the date of the agreement. In consideration whereof, C agreed to pay W for said engine, so as aforesaid to be constructed and put up, the sum of \$3700, in the following proportions; \$100 each week, as the work progressed, until the same should be finished and put up as aforesaid, when the sum of \$1200, including the weekly advances, was to be paid; the residue of the consideration \$2500 was to be paid in six, nine, and twelve months, from and after the said engine should have been put into full and effective operation, to the full extent and meaning of the said covenant.” C, agreed also, that he would provide and pay for the brick and stone work necessary for putting up the boilers of said engine, and likewise pay for the brick and stone work. W further agreed to warrant and insure the faithful performance of the engine, for the term of twelve months from the



time it should be put into operation as aforesaid. **Held**, that upon the true construction of this covenant, 1. That the parties contemplated the completion of the engine before the weekly payments would amount to the sum of \$1200. 2. That the time limited for the completion of the engine was of the essence of the contract. 3. That W was not entitled to recover the \$2500 under the covenant, until he had complied with the stipulations of the contract, as well in relation to the time fixed on, as to other particulars. 4. That it was not necessary for C to provide the brick and stone work for putting up the boilers, before the boilers would be in a state of readiness to be put up, of which fact, it was the duty of W to inform C in due time. - - - - - *Ib.*

3. Where a covenant exists to do a particular piece of work, if after the work is done, though not pursuant to the contract, the party for whom it is done accepts it, it would seem to be right and proper that he should pay for it, what it is worth. Justice requires this, and the principles of the law do not forbid it. *Ib.*

See Lessor and Lessee, 1.

#### DEBTOR AND CREDITOR.

See Court of Chancery, 11, 13, 14, 15, 16.

- Insolvent Debtors, 1, 3, 4.
- Mortgage, 10, 11.
- Surety, 1, 2, 3.

#### DECREE.

See Court of Chancery.

- Evidence, 28, 29.

#### DEFEASANCE.

See Mortgage, 5.

#### DEVISE.

See Will and Testament.

#### DONATIONS.

1. A promissory note, payable to a payee or order, is not the subject of a donation *mortis causa*, by mere parol. *Bradley, et ux. vs. Hunt, adm'r. of Jack*, - - - - - 54
2. The mere delivery by a husband, in his last sickness, to his wife, of a promissory note, payable to him or

order, is not valid, as a *donatio mortis causa*. No property in such a note passes by delivery; being a *chose in action*, it must notwithstanding the delivery, be sued in the name of the executor of the husband. - - - - - *Ib.*

3. Bank notes, and promissory notes, payable to bearer, pass by delivery as money, and constitute valid donations when delivered; for in such cases the property in, and legal dominion over the thing intended to be given, pass with the possession. *Ib.*
4. Whether the distinction prevailing in *England*, between the case of a bond and a promissory note payable to order, as to donations *mortis causa*, will be adopted here. (*qr.*) *Ib.*
5. The act of 1763, ch. 13, relates wholly to gifts of negroes and slaves. *Clagett, et al. vs. Salmon*, 314

#### DOWER.

1. A married man was seized of land in 1789, which during that year was sold at Sheriff's sale, to the ancestor of the defendant. The first tenant in fee died in 1802; his widow died in 1823. In 1827 the administrator of the widow filed a bill to recover a proportion of the rents and profits of the land, in lieu of dower. No demand or suit for the dower had been made or commenced by the widow in her life time; no reason was alleged for the omission. The purchaser and his descendants had been in possession from the time of sale. **Held**, that the plaintiff could not recover. *Steiger's adm'r vs. Hillen*, 121

#### EJECTMENT.

See Will and Testament, 1, 11.  
— Lessor and Lessee.

#### EVIDENCE.

1. In an action founded upon the special guaranty of a promissory note, brought by the payee of the note against the guarantor, the wife of the maker of the note is not a competent witness to prove the note void for usury in its origin, without a sufficient release. *Thomas vs. Catherall*. - - - - - 23
2. In an action for goods sold and delivered, a clerk of the plaintiff may give evidence of the delivery

- of goods, by referring to entries in the plaintiff's books made by such clerk, testifying to his belief of their truth at the time of making them, and proving generally the dealings of the defendant with the plaintiff for such articles as those charged by the clerk; but he cannot establish such a delivery, by reference to entries made by the plaintiff or other clerks, of which he has no knowledge other than that arising from the course of business of the plaintiff's store. *Owings & Piel vs. Loe*, - - - - 134
3. There is no usage in this State which makes the books of accounts of a storekeeper, evidence *per se*, upon proof that he is a man of integrity. - - - - - *Ib.*
  4. Pending an action brought by O and P, as partners, for certain hardware sold and delivered, the partnership was dissolved, and the interest of P in the effects of the firm assigned to O for value. The suit was then entered for his use. At the trial the defendant proved that during the partnership one of the plaintiffs informed the witness, that they had an interest of three-fourths in certain houses building on F street by the defendant, and that the defendant was to take hardware for that interest. The defendant then proposed to prove that in a conversation *after the dissolution*, P informed the witness, that the plaintiffs had taken an interest of *three-fourths of a house* in the houses aforesaid, and the plaintiffs were to give defendant the hardware for which this suit was brought, for such interest. The County Court admitted the evidence, but this court upon appeal, decided it to be incompetent. *Ib.*
  5. Declarations of a partner, made after dissolution, cannot *per se*, establish a contract against his co-partner. - - - - - *Ib.*
  6. The declarations of an agent, in relation to his agency, made subsequent to its execution, when his authority was *functus officio*, are not evidence against his principal. *Ib.*
  7. The plaintiff upon the record at common law, cannot, unless he voluntarily waive his privilege, be compelled to give testimony for the defendant, - - - - - *Ib.*
  8. In an action of debt to recover the amount of a single bill, due in 1824, the defendant pleaded by way of set-off, a claim for various articles sold and delivered; and upon the trial, proved a lease of land by him to the plaintiff, dated in 1830; in which the plaintiff covenanted to pay the defendant a certain annual sum for life, &c. and to pay all claims and demands existing against the defendant at the date of the lease. The defendant also proved an appraisement made at the request of the parties, of various articles of personal property, (which the appraisers certified the plaintiff was to take as his property at the valuation;) that such articles were delivered to the plaintiff at the valuation; and that the lease, appraisement and delivery were made at the same time. The plaintiff then proposed to prove a verbal agreement between him and defendant, that the value of this property should be applied by the plaintiff to the payment of the outstanding debts of the defendant. The County Court rejected the evidence, but this court reversed that decision, and **HELD** that as the appraiser's certificate did not show in what manner the property valued was to be paid for, parol evidence was admissible to ascertain that fact. *McCready vs. McCready*, - - 147
  9. Parol evidence is admissible in cases of written contracts, to prove any collateral, independent fact, about which the written agreement is silent; such proof is perfectly consistent with, and does not in the least tend to contradict, vary or explain the written instrument. *Ib.*
  10. In an action of debt upon a single bill, where the issue was joined upon the defendant's plea in bar of a sale to, and a claim for the hire and use of various articles of personal property against the plaintiff, evidence which shows a delivery of such personal property by the defendant to the plaintiff, in consideration of the plaintiff's agreeing to pay all the defendant's debts is not admissible; such an agreement is equivalent to accord and satisfaction of the debt sued for, and ought to be so pleaded. *Ib.*
  11. The sentence of condemnation of a foreign prize court is evidence of the fact which it purports to de-

- cide, in an action on a policy of insurance on the thing condemned, and was conclusive evidence thereof, until the act of 1813, ch. 164, reduced it to character of *prima facie* proof; but the proof upon which such sentence may have been predicated, is not, *per se*, admissible in such collateral action. *Maryland and Phoenix Insurance Co. vs. Bathurst*, - - - - - 159
12. The record of the proceedings of a foreign court of admiralty, containing copies of various documents, and reciting the proofs of the originals thereof being found on board of a vessel, condemned by such court, at the time of her capture, is not evidence that such documents were so found, in an action upon a policy of insurance to recover the value of the condemned vessel. - - - - - *Ib.*
13. Where the sentence of a Court of Admiralty condemning a vessel, recited that *at the date of the decree*, the port which such vessel had attempted to enter was blockaded, evidence that *at the time of her capture*, such port was not in fact blockaded is immaterial and irrelevant, in an action upon a policy to recover for a total loss arising from the condemnation, and although the County Court permitted such evidence after objection to go to the jury, yet it is not error for which this court would reverse the judgment. - - - - - *Ib.*
14. The party who offers the decree of a foreign Court of Admiralty in evidence, as proof of the loss of his vessel condemned thereby, may, since the act of 1813, contradict by proof, the facts and circumstances upon which such decree professes to be founded, where such facts are in issue between the parties to the cause in which the contradictory proof is offered. *Ib.*
15. In a question of fraud, any fact, no matter how slight, bearing at all upon the point at issue, and not wholly irrelevant, may be admitted as evidence; but the circumstances when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact they are offered to establish. *Davis vs. Calvert*, 269
16. It is a well settled rule of evidence, that remote and collateral facts and circumstances not pertinent or relevant to the issue to be tried, are inadmissible in evidence; but it is equally well settled, that facts and circumstances tending to prove the issue are admissible. *Ib.*
17. It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation: in such cases, the court not *clearly* seeing that it is wholly irrelevant to the issue, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it, that it will turn out to be pertinent and material. - - - - - *Ib.*
18. Declarations adverse to a will, and bearing upon or tending to prove certain issues framed by the Orphans Court upon a *caveat* to a will, made by the executor of the will, who was also defendant on the record, and a contingent devisee representing every interest under the will, are competent evidence to go to the jury. - - - *Ib.*
19. Upon an inquiry whether a will was obtained by fraud or undue influence, the condition, character and conduct of the persons drawn around the testator, are of importance to be inquired into in reference to his family and relations, the extent and nature of his estate, the character of the dispositions of the will, and the persons to whom the property is given. - - - *Ib.*
20. The statement by counsel of what they expect to prove in opposition to the statement on the other side, is not sufficient to lay a foundation for letting in testimony otherwise inadmissible. - - - - - *Ib.*
21. Evidence that it was not generally known in the place where a certain partnership was carried on, that T was a partner, is admissible to the jury, where the inquiry is, whether the plaintiff knew that the defendant was a partner in order to make him liable. General evidence that he was known as a partner, is also admissible under such circumstances. *Bernard vs. Torrance*. 383
22. To a bill to vacate conveyances, charged to be fraudulent, and comprising *all* the grantor's real estate,



- the defendant, his grantee, denied the facts, and averred, that after the delivery of the deed to him, the grantor was seized, and possessed of real estate both in F and M counties, abundantly sufficient, as he believed, to pay complainants. *HELD*, that the fact of the grantor's owning other real estate in F and M counties was in issue in the cause, and being an affirmative allegation in the answer, the burthen of proof was on the defendant. *Birely and Holtz vs. Staley*, 432
23. The mere production of deeds of conveyance, unaccompanied by any proof of the existence of the property conveyed, and the title of the grantor thereto, or his possession thereof, or the possession thereof by the grantee, is wholly insufficient to prove that the grantee had the property described in the conveyance, or that it was a fund out of which creditors might have been satisfied. - - - *Ib.*
24. Evidence obtained upon leading interrogatories will not be rejected at the hearing, where the same facts are obtained from the same witness, upon other interrogatories not liable to that objection. *Ib.*
25. Where the defendant in his plea of justification, to a declaration charging him with a libel, introduced certain passages from a pamphlet written by the plaintiff, upon which plea issue was joined; this is not so far an adoption of the whole pamphlet as true, as to enable the plaintiff to read other passages in it, for the purpose of showing that the defendant was the aggressor in the controversy, which led to its publication. *Kearney vs. Gough*. - - - - - 457
26. Where proferat is made in a declaration upon a bond, the original of which is required by law to be filed in court, it does not impose on the plaintiff, the obligation to produce the original bond, either upon *oyer* craved, or upon the trial of the issue of *non est factum*; a certified copy is sufficient. *Butler and Belt vs. The State, use of Contee*, 511
27. In ordinary cases, upon the trial of issue joined upon the plea of *non est factum*, the plaintiff is bound to produce the original bond, with or without *proferat* made in the declaration. - - - *Ib.*
28. In an action of debt on a bond given by a trustee, appointed by the court to sell real property, the condition of which was to perform the duties required by the decree under which he was appointed, and any future decree in the premises, the replication to the plea of performance, assigned as a breach, that after the sale and receipt of money by the trustee, an audit was made and ratified by the court upon the 29th July, 1831, and the trustee thereby ordered to pay over to the plaintiff the sum due him by the audit, which he refused to do, &c. To this the defendant rejoined, that on the 17th December, 1830, his appointment as trustee was revoked. The court sustained the plaintiff's demurrer to the rejoinder, and upon execution of a writ of enquiry, refused to permit the defendant to show in mitigation of damages, either that he had not received money enough to pay the plaintiff's claim, or that upon the revocation of his appointment, he had paid the balance in his hands to his successor, also appointed by the court. - - - - - *Ib.*
29. Evidence cannot be permitted to go to a jury, the necessary effect of which is to reverse a decree of a court of equity, solemnly, absolutely and judicially pronounced, and which can only be re-examined upon appeal, re-hearing, or bill of review. - - - - - *Ib.*
- See* Court of Chancery, 16.  
 — Insurance, 5.  
 — Insolvent Debtors, 3.  
 — Judgment, 4.  
 — Limitation of Actions.  
 — Practice, 1.  
 — Will and Testament, 10.
- ### EXECUTION.
- See* Fieri Facias.
- ### EXECUTOR AND ADMINISTRATOR.
1. The money recovered upon an appeal bond given to the obligees as executors, on an appeal from a judgment obtained by them in that character, will be assets in their hands.—*Sasscer vs. Walker*. - 102
  2. Judgment against Executors not evidence against the heir of the de-



ceased. *Birely and Holtz vs. Staley*. - - - - - 432

3. Where a testator in *Ireland*, appointed executors there, and declared that certain persons should be trustees of his property in *America*, with power and direction to collect and remit the same to his executors in *Ireland*, such persons are to be considered, not as trustees, but as limited executors, and bound to execute the trust in the mode prescribed by the will under which the authority was derived. *Hunter vs. Bryson*, - 483
4. A testator may appoint different executors in different countries in which his effects may lie, or different executors, as to different parts of his estate in the same country. *Ib.*

5. A testator cannot appoint a trustee of his personal property by his last will, so as to evade the provisions of the testamentary system. Such a trustee cannot act in the first instance without taking out letters testamentary or of administration, and having taken out letters of administration, if the duties imposed upon him by the will, as trustee, are the same which, as administrator, he is bound by law to perform, he cannot discharge himself as administrator by a payment to himself as trustee. *Ib.*
6. Commissions of Executors and Administrators. See Orphan's Court, 1, 2, 3.

See Court of Chancery, 16, 17, 18.

- Donation, 2.
- Dower, 1.
- Limitation of Actions, 1, 2.
- Mortgage, 8.
- Pleas and Pleading, 3, 4, 5, 6.

#### EXTINGUISHMENT OF DEBTS.

- Judgment, 3.
- See *Fieri Facias*.

#### FIERI FACIAS.

1. The mere taking property under a *fieri facias*, is not of itself equivalent to payment, and does not amount to satisfaction of the judgment. And a plaintiff may countermand a *venditioni exponas*, and at the instance and for the accommodation of the defendant, restore the property levied upon under a *fieri facias*, without being actually

paid, and without impairing his claim. *Sasscer vs. Walker*, - 102  
See Action, right of, 1.

#### FOREIGN SENTENCE.

See Evidence, 11, 12, 13, 14.  
— Insurance, 11, 12.

#### FRAUD.

1. Fraud vitiates every thing with which it is connected. A will obtained by fraud is void. *Davis vs. Calvert*. - - - - - 269
2. Fraud is never to be presumed, yet it is not necessary to prove it by positive and direct testimony. *Ib.*  
See Court of Chancery, 13, 14, 15, 16, 18, 19.  
— Mortgage, 3, 4.

#### FRAUDULENT CONVEYANCES.

See Court of Chancery, 13, 14, 16, 18, 19.

#### GUARDIAN AND WARD.

1. S died, leaving E his widow, and an infant son entitled to personal property. The widow refusing to act as guardian, the Orphans Court appointed J, who accepted the trust. During this guardianship E married again. J then died, leaving the son of S still a minor. E, the mother, as natural guardian, with the consent of her second husband, now undertook the guardianship, and gave bond in that character for the faithful discharge of the trust, with security, in which her second husband united. In an action on this bond brought in the name of the State (the obligee,) for the use of the ward after his arrival at full age. **Held**, that the mother was the natural guardian. That the Orphans Court had jurisdiction to accept the bond. That the action could be maintained against a surety without suing the guardian. That an order from the Orphans Court directing the guardian to pay the ward, was not essential to the right of action. *Jarret vs. State use of Stump*. - - - - - 27

#### INSOLVENT DEBTORS.

1. By the common law, and apart from the provisions of the insolvent laws of this State, a debtor may secure one creditor to the exclusion of others, either by payment, or a *bona fide* transfer of his

- property. *Hickley vs. Farmers and Merchants Bank*, - - - - 377
2. Under the settled construction of the acts of 1812, ch. 77, sec. 1, and 1816, ch. 221, sec. 6, the words, "with a view or under an expectation of being or becoming an insolvent debtor," used in those acts, are held to mean, with a view or under an expectation of taking the benefit of the insolvent law. - - - - - *Ib.*
  3. Where the permanent trustee of an insolvent debtor proceeded in equity to set aside the judgment confessed by the insolvent prior to his application for a release under the insolvent laws, upon the allegation that the judgment was confessed under the expectation of becoming an insolvent debtor, and enabled the plaintiff, creditor, to pay himself by his levy upon the defendant's property in preference to other creditors, and in support of his case examined the insolvent as his witness, who deposed, that he was in fact insolvent when he confessed the judgment, "but that he hoped at that time to be able to settle with his creditors; that he had not then the slightest idea of taking the benefit of the insolvent laws, and contemplated no such alternative, not having thought on the subject at the time referred to;" there being no evidence in the record to control the insolvent's proof, or showing the existence, at the time of the confession, of any such expectation: **Held**, that the transaction must be left to its operation at common law, and being *bona fide*, and for a sufficient consideration must be sustained. *Ib.*
  4. By the act of 1827, ch. 70, sec. 7, confessed judgments were declared within the operation of the insolvent laws, except in the city and county of *Baltimore*; and by the acts of 1830, ch. 65, and 1831, ch. 316, sec. 5, the like principle applies to confessed judgments in the city and county of *Baltimore*: prior to these acts, judgments had not been considered preferences within the meaning of the insolvent laws. - - - - - *Ib.*

## INJUNCTION.

See Mortgage, 12.

## INSURANCE.

1. Where the insured is informed of the loss of his vessel by capture, he need not abandon to the underwriter: but may wait to ascertain whether his property is condemned, and then claim to be paid. *Maryland and Phoenix Insurance Co. vs. Bathurst*, - - - - 159
2. If in a reasonable time after notice of capture, the insured fails to abandon, he loses the privilege of doing so, and cannot recover for a total loss on any abandonment for that cause subsequently made. - - - - - *Ib.*
3. In recovering for a total loss founded upon an abandonment, the insured must prove as the basis of his action, the cause assigned in the notice of abandonment. - - - - - *Ib.*
4. An order for insurance against all risks for account of whom it may concern covers belligerent as well as neutral risks; and an endorsement upon such an order, stating, "although our advices give us no reason to believe that there will be any articles contraband of war on board, still as we wish to be covered against all possible risk, we request your re-consideration of the within, including articles contraband of war," does not alter the character of the original application, nor constitute a warranty or representation of neutrality. *Ib.*
5. Facts of universal notoriety in the commercial world, at the time of effecting an insurance upon a particular voyage, which relate to the course of trade upon such voyage, which form a part of the public history of that time, are lights, against which a court of justice cannot shut its eyes, and of which the law imputes knowledge to underwriters. - - - - - *Ib.*
6. Where an order for insurance is against all risks, or all possible risks for account of whom it may concern, upon a certain defined voyage, the insured is not bound to communicate or disclose at the time of effecting such insurance without inquiry from the underwriter, the particular circumstances connected with the voyage, which show that it is in fact a bel-

- ligerent risk, as the transportation of hostile stores, troops, &c. *Ib.*
7. The obligation to disclose facts to an underwriter, is limited to such facts as would vary the risk or nature of the contract; no communication need be made of what is necessarily implied by the contract. - - - - - *Ib.*
8. The *English* rule, that the right to recover for a total loss is not made absolute by the state of the facts on which the abandonment is founded, continuing to exist at the date of the abandonment, but is dependent on subsequent events, does not prevail here. - - - *Ib.*
9. The right to recover of the assurer for a total loss is complete, if the loss, which is the basis of an abandonment, continues at the time of the abandonment, and of this consummate right or privilege, the assured cannot without default be deprived, but by his consent expressed or implied. It may be waived like other privileges. *Ib.*
10. If after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or re-taken by the crew, or be recovered and delivered to the owners who claim and use her as their own, they possess her under no new title or right of property; and this constitutes a waiver or surrender of the abandonment. *Ib.*
11. But where a condemnation takes place, the assured, apart from all statutory regulation on the subject, is divested of all property in the ship; and in it, if purchased by themselves or their agents, they acquire a new and independent title, to which their subsequent acts of ownership are imputable, and not to their original proprietary rights. And this new title, against all the world save the underwriters, is incontrovertible; and it is conclusive against them, if they consented to its acquisition, or have waived the right to impeach it. - - - - - *Ib.*
12. So where the insured vessel was captured and condemned, and purchased by the master, who drew upon his owners for the amount, and information of these facts was communicated to the underwriters at the time of making a claim for a total loss, and the underwriters

did not claim the purchase, but contested their liability upon the ground of not having seen the protest of the captain; it was HELD, that they had waived their right to consider the purchase as made for their account, and could not at the trial insist that the insured had only suffered a partial loss, but were liable for a total loss. *Ib.*

13. Where notice was given to underwriters of a claim for the condemnation of the insured vessel, and they at first demanded the captain's protest, and after some correspondence the underwriters notified the insured that "they did not consider themselves answerable for the claim," this was HELD, to be a waiver of all objection to the preliminary proofs offered by the assured. - - - - - *Ib.*

#### JAIL.

See Sheriff, 1, 2, 3.

#### JUDGMENT.

1. A lien upon real estate in equity, vide Court of Chancery, 1, 6.
2. A judgment in the usual form was confessed, subject to the following terms: "Judgment was rendered in the cause, upon, &c., for the damages laid in the declaration and costs,—to be released on payment of such sum as M shall say is due and costs. To bind a proportion of assets to be ascertained by M." HELD, that this was a final judgment; that to make it absolute, so far as regarded the amount due, no farther action of the court was necessary. The filing of M's certificate thereof, was all that was required for that purpose. *Turner vs. Plowden*, - - - - - 52
3. The claim upon which this judgment was founded, was thereby extinguished, and could not afterwards be available, either as a substantive cause of action, or by way of set-off. - - - - - *Ib.*
4. A judgment against an executor or administrator, not only does not bind real assets, but is not even *prima facie* evidence of a debt, where the real estate of a deceased debtor has been sold for the payment of debts due by him. *Birely and Holtz vs. Staley*, - - 432



5. A creditor of a deceased party cannot obtain judgment against his heirs where they have no assets by descent. - - - - - *Ib.*
  6. Effect and operation of a judgment in another State of the Union, under the Constitution of the United States. *Wernicag vs. Pauling*, 500
  - 7 Evidence to countervail an unreversed judgment not admissible. *Butler and Bell vs. The State*, use of *Conlee and Bowie*, . . . . . 511
- See Action, right of, 1.  
 — Arrest of Judgment, 1.  
 — Court of Equity, 14, 15, 16.  
 — Fieri Facias, 1.  
 — Insolvent Debtor, 4.

### JURISDICTION.

1. An action at law will not lie to enforce a decree in chancery, within the territorial jurisdiction of the Chancery Court. *Cox vs. Jones*, 65
- See Mortgage, 12.

### JUSTIFICATION.

- See Evidence, 25.  
 — Action, right of, 2 and 3.

### LESSOR AND LESSEE.

1. In 1780, R demised to L a tract of land for ninety-nine years, at a certain annual rent, and covenanted to renew the lease upon the payment of a year's rent, as a fine for other ninety-nine years, to commence from the expiration of the first term, and also, that L should quietly enjoy the premises upon payment of the rent. The lease reserved the usual right to re-enter for non-payment of rent, but contained no agreement in relation to the payment of taxes. In an action of covenant brought upon this lease in 1828, it was HELD, that the taxes assessed upon, and chargeable against the demised premises, were due from, and payable by the lessee or his assigns, and that he could not set-off a payment of taxes, against a claim for rent. *Hughes vs. Young*, - - - - . 67

### LIBEL.

- See Evidence, 25.

### LIEN.

- See Court of Chancery, 1, 3, 6.

### LIMITATION OF ACTIONS.

1. In an action of *assumpsit*, under the plea of limitations, the plaintiff proved, that the defendant, an administrator, in answer to a demand for payment, said, "he thought the debt had been paid, and he thought he could produce the receipts; if he could not produce the receipts, and it was correct, it should be paid." HELD, that it was incumbent on the plaintiff to prove the debt before he could avail himself of the promise. *Kent vs. Wilkinson*, . . . . . 497
2. Whether, where there are two or more administrators, the promise of one, if absolute, is sufficient to take the case out of the act of limitations.— *Quere*. . . . . *Ib.*

### MORTGAGE—MORTGAGOR AND MORTGAGEE.

1. A mortgagor who goes into Chancery to redeem will only be permitted to do so, upon the payment of the mortgage, and all other debts due from him to the mortgagee. *Lee and wife and Jordan vs. Stone and M'Williams*, . . . . . 1
2. But if a mortgagee seeks a foreclosure in Chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only; and if a subsequent mortgagee, a judgment creditor files a bill to redeem, he will be permitted to do so upon payment of the mortgage debt alone. - - - - - *Ib.*
3. A mortgagee may become the purchaser of the equity redemption, if he does not make use of his incumbency to influence the mortgagor to part with the estate for less than its real value. *Hicks vs. Hicks and Norris*. - - - - - 75
4. Where the relation of mortgagor and mortgagee exists, and the latter purchases from the former his equity of redemption, worth from \$2000 to \$2500 for \$1600, this is not such an inadequacy of price, as to induce a Court of Equity, in the absence of corroborative proof, to impeach the sale as unfair. It is a circumstance to be weighed in the consideration of the subject, but it is not unsupported, to overbalance other facts indicating an honest negotiation between the parties. - - - - - *Ib.*
5. An instrument or defeasance exe-



- cuted by the grantee, at the time of the execution of an absolute conveyance to him, for reconveyance to the grantor on his paying a sum of money, may constitute the transaction a mortgage; but such an instrument does not always operate that effect. - - - - - *Ib.*
6. The character of the transaction must in every case depend on the inquiry, whether the contract is a security for the re-payment of money. If it is, the parties are in the relation of mortgagor and mortgagee. If it is not, the transaction must take the stamp of a conditional sale. - - - - - *Ib.*
7. A case of conditional sale. *Ib.*
8. C died, and an inventory of his estate was returned by his administratrix to the Orphans Court, in 1816, who passed an account termed a final account in 1823. In 1827, the administratrix and several of the children of the intestate united in a mortgage of property mentioned in the inventory—HELD, that the rights of creditors of the deceased not being in controversy, the mortgagors could not contend that this property was in the hands of the administratrix for distribution, and from the lapse of time, a court of equity would presume, in support of the mortgage, that the intestate's debts had been paid, and distribution made. *Clagett, et al. vs. Salmon*, - - - - - 314
9. The act of 1763, *ch. 13*, relates wholly to gifts of negroes and slaves, and has nothing to do with mortgages, or other assurances for valuable consideration. - - *Ib.*
10. By the act of 1729, *ch. 8*, a mortgage of personal property, of which the mortgagor retains possession, is void, so far as the rights of creditors are concerned, unless acknowledged and recorded as therein prescribed, but although not recorded at all, or not recorded in time, it is still legally effectual against the mortgagor and all claiming under him. - - - *Ib.*
11. Several persons united in a mortgage of the property, reciting that C, one of the parties, had lately commenced, and intended pursuing the business of a merchant, and that the mortgagee had agreed to give him credit and become his

- surety and endorser to the amount of \$10,000 in the prosecution of his business, and the mortgage also contained a proviso to indemnify the mortgagee from all advances, &c. which he shall "incur or make on account of the said C, not to exceed at any one time the sum of \$10,000." HELD, that the sureties of C were not discharged because the mortgagee did not limit his advances to the sum of \$10,000, and that the object of that stipulation was merely to confine their responsibility within that sum, and not to prevent the mortgagee giving C further credit. - - - - - *Ib.*
12. A mortgagee, before the period at which he has a right to foreclose or sell, the subject mortgaged, upon a bill charging that the mortgagors contemplate and design to sell and dispose of the mortgaged property, with a view of defeating his lien, or that he is apprehensive the defendants will sell, dispose of, conceal, or remove the whole of the personal property before the same could be made responsible to him for the satisfaction of his claim, may obtain an injunction to preserve the property, and prevent it from being removed before it could be made responsible for his claim according to the terms of the mortgage, and the Chancellor may pass a final decree upon such a bill in conformity with the principles, and for the objects, above mentioned. - - - - - *Ib.*

# NE EXEAT REGNO.

1. The object and design of the writ of *ne exeat regno*, as used by courts of chancery, is to hold the party amenable to justice, and to render him personally responsible for the performance of their orders and decrees. *Johnson vs. Clendenin & Way*. - - - - - 463
2. The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law; they undertake that the defendant shall be personally responsible for the performance of the orders and decrees of the court. *Ib.*
3. Where the defendant in the writ of *ne exeat* has been proceeded against and committed to jail for not com-

plying with a final decree of the court in the cause, and afterwards escapes from custody, his securities upon the *ne exeat* bond are not responsible, and the court as respects them may order the bond to be cancelled. - - - - - *Ib.*

### NEGROES.

See Sheriff, 2.

### ORPHANS COURT.

1. It is in general, the duty of the Orphans Court to determine the commissions of an executor or administrator, by allowing a percentage upon the inventory of the deceased's estate; and that includes, in an enlarged construction, all the assets accounted for. *McPherson vs. Israel, Adm'r of Agnew.* - 60
  2. One of the limitations to the exercise of the discretionary power of the Orphans Court, prescribed by the act of 1798, *ch. 101, sub-ch. 10, sec. 2*, is, that the court shall not allow a less rate of commission than 5 per cent. but this only applies to those cases, where there has been a full administration by the first executor or administrator. *Ib.*
  3. Under the act of 1820, *ch. 174*, taken in connexion with the act of 1798, in cases of partial administration, where there is a further administrator to be paid for services, the court may allow such compensation to the first administrator as the services performed actually merit. They may give one per cent. or even less: whatever is allowed must nevertheless be a per centage on the whole assets. This is the only standard under the law, whereby to ascertain his commissions. *Ib.*
- See Executor and Administrator, 3, 4, 5.
- Guardian and Ward, 1.

### PARTNER AND PARTNERSHIP.

1. Where O and P were partners in trade, and upon the dissolution, P assigned for value, all his interest in the partnership to O, a court of law will not permit P by his mere declaration made after such assignment to defeat an action brought in their joint names. *Owings & Piet vs. Low.* - - - - - 134
2. A retiring partner may be discharged from the debts of the partner-

ship, by the acceptance by the creditor of new notes of the other partners, as renewals of the notes first given, provided the creditor agreed to discharge him by the acceptance of such new notes; which is a question for the jury—but where the new notes corresponded entirely with those first given, as where they were all signed by I as agent, and the creditor was ignorant of any change in the partnership, no agreement to discharge can be inferred. *Bernard vs. Torrance,* - - - 383

3. Where a retiring partner does not give notice of his withdrawal, he remains responsible to those who knew he had been a partner, who are ignorant of his withdrawal, and give credit to those who afterwards carry on business in the partnership name. - - - - - *Ib.*
  4. Evidence that it was not generally known in the place where a certain partnership was carried on that T was a partner, is admissible to the jury, where the inquiry is, whether the plaintiff knew that the defendant was a partner in order to make him liable. General evidence that he was known as a partner, is also admissible under such circumstances. - - - - - *Ib.*
  5. One partner cannot bind another by his bond sealed in the name of the firm, to perform an award, though the bond is binding upon the party who seals it, and may be declared upon accordingly. *Armstrong vs. Robinson.* - - - - - 412
- See Evidence, 4, 5.
- Principal and Agent.

### PLEAS AND PLEADINGS.

1. It is only upon the case made in the pleadings that a plaintiff can ever recover; it is always necessary therefore, that the declaration should set out a good and sufficient cause of action, to be judged of by the court. *Cox vs. Jones,* - - 65
2. Where a declaration professed to be founded on a decree in chancery for the payment of money, and sets out certain mutilated proceedings in chancery, which show no such decree, nor whether there ever was a final decree in the cause, it cannot be the foundation of a judgment for the plaintiff. - - - - - *Ib.*
3. The executors of W obtained a judgment against K, from which

- he appealed, and gave a bond with S as his surety. This judgment being affirmed, a suit was afterwards brought upon the appeal bond, against K and S. The writ in the latter case was in the *detinet* only, and the plaintiffs therein were styled "executors of the testament and last will of W, deceased." In the declaration which recited the writ, the plaintiffs without being named, were styled throughout, "the said plaintiffs." In the replication assigning breaches, the plaintiffs styled themselves executors, &c. To the replication there was a rejoinder, and to that, a general demurrer by the plaintiffs. **HELD**, that the words, "the said plaintiffs," in the declaration, must be understood as having reference to the plaintiffs as described in the writ, and that the contract sued on, being one on which the plaintiffs could maintain an action in their representative characters, there was no error in the pleadings. *Sasscer vs. Walker's Ex'rs*, - - - - 102
4. Where a plaintiff sues upon a contract on which he can only maintain an action in his individual right, if he is described with the addition of executor in the writ, &c., this may be treated as a superfluous description, and not irregular, the demand being the same. - - - - - *Ib.*
  5. Where the writ is in the *detinet* only, the plaintiff suing on a contract in his own right, this, since the *Stat. of 4 and 5 Ann, ch. 16*, cannot be taken advantage of upon general demurrer. - *Ib.*
  6. Wherever the money recovered would be assets in the hands of an executor, plaintiff, he may sue in his representative character, tho', from the form of the contract he might also sue in his own right. *Ib.*
  7. Where a bond was payable to R & Co. a declaration stating, that A acknowledged himself to be held and firmly bound unto R & Co., by the name and style of R & Co. is sufficient, and this is no variance. *Armstrong vs. Robinson*. - - 412
  8. In actions founded upon contract, whether by parol or deed, if the demand or cause of action be joint, all the parties, if alive, must join in bringing the action, which should properly be in their names, and not in the name of the company or firm, where it is a company or firm, that has the cause of action. - - *Ib.*
  9. In actions upon the contract, where all the parties do not join as plaintiffs, the defendant may avail himself of the non-joinder upon proof at the trial, or he may plead such matter in abatement, or if it appears on the record by the pleadings, he may take advantage of it by demurrer. - - - - - *Ib.*
  10. In a suit on a bond signed A & Co. the writ and declaration were against A only; the court will not upon general demurrer assume, that there was any other living person jointly bound with A at the time the suit was brought, nor that A was not A & Co. - - - - *Ib.*
  11. In declaring on a bond it is not necessary to set it out in *hæc verba*, but it is sufficient if it is stated according to its true legal effect and operation. - - - - - *Ib.*
  12. A plaintiff at law cannot unite in his declaration, counts against the defendant, in the character of executor, with counts against him individually, and if this is done under our practice, the defendant may move the court at the trial, to instruct the jury that the plaintiff cannot recover in that state of the pleadings, because of the misjoinder of actions. *Grahame & Parran vs. Harris, Parran, & Co.* - 489
  13. The same natural person cannot be both plaintiff and defendant at law. - - - - - *Ib.*
  14. In an action of debt on a bond, where the original bond is filed with the clerk of the court, and there to remain and become a public record, as in the case of a trustee's bond, given in pursuance of a decree of a court of equity, the plaintiff is not in legal contemplation in the possession of the original bond, nor required to make a profert of it. *Butler and Belt vs. the State, use of Contee and Bowie*, - - - - 511
- See Court of Chancery*, 12.
- Covenant, 2.
  - Evidence, 10, 25.
  - Partner and Partnership, 5.
  - Practice, 8, 9.
- ### PRACTICE.
1. Where a witness was properly re-



- jected by the County Court as incompetent without a release, and a release executed and tendered at the bar, objected to as insufficient, was held sufficient, and the witness admitted to testify, this court upon appeal reversed the judgment, because the release did not appear in the record, and therefore, they could not hold that the first objection had been removed. *Thomas vs. Catherall*. - - - - - 23
2. Usury is a question of fact for the determination of the jury. - *Ib*.
3. When judgment is rendered upon a demurrer in favor of a plaintiff, an inquisition to assess the damages may be waived by consent, and final judgment will be entered for the sum agreed on by the parties. *Jarrett vs. State, use of Stump*, 27
4. In an action upon a bond with a collateral condition, where judgment is rendered upon demurrer, after assignment of breaches, for the plaintiff, a jury of inquiry ought to be sworn to assess the damages, and it is error in the County Court to enter a final judgment without such assessment. *Sasseer vs. Walker*, - - - - - 102
5. Courts of common law have, to a limited extent, for purposes of justice, recognized the interests of the assignees of legal *choses in action*; and by a summary equitable jurisdiction, exerted on motion, they will protect those assignees against such acts or admissions of their assignors, as would operate in fraud of their rights. This protection is afforded, whether the defence arises upon plea, or appears upon evidence under the general issue. *Owings & Piet vs. Love*. 134
6. A court of justice may, in its discretion, content itself with a simple refusal of any prayer not sanctioned by the rules of law. *Maryland and Phenix Insurance Companies vs. Bathurst*, - - - - - 159
7. It is our settled practice, to give the plaintiff on the record the opening and conclusion of the argument to the jury, except in cases of avowry for rent in arrear, in relation to which the practice is not uniform. *Kearney vs. Gough*, - - - 457
8. Where a jury has been sworn, the defendant cannot call upon the court to *non pros* the plaintiff's suit without the plaintiff's consent. *Grahame & Parran vs. Harris, Parran & Co.* - - - - - 489
9. Upon the trial of the issue joined upon *non est factum*, it is the province of the jury to find whether the bond declared on, was in point of fact executed by the defendant. *Butler and Belt vs. The State, use of Contee and Bowie*, - - - - - 511
10. In an action on a trustee's bond conditioned to perform the decree of a court, upon the trial of the issue joined upon *non est factum*, the original bond being mislaid, the plaintiff produced a copy duly certified by the clerk of the court, and the defendant produced another certified copy varying from the first—the county court instructed the jury, that they ought to be satisfied by the evidence, that of the varying copies, that produced by the plaintiff is the one, which truly states the date of the bond alleged to have been executed by the defendants, and truly recites the decree.—*PER PRINCE GEORGE'S COUNTY COURT*. - *Ib*.
- See Appeal, 1, 3.  
— Arrest of Judgment, 1.  
— Judgment, 2, 3.
- ### PRACTICE IN CHANCERY.
1. This court considers in some cases what is done without an order, as if sanctioned by the order of the court. See Court of Chancery. 2  
See Court of Chancery, 10, 17, 20.  
— Evidence, 24.
- ### PRINCIPAL AND AGENT.
1. T and B were partners carrying on business in *Baltimore*, under the name of the Warren Factory. The business was conducted exclusively by a *general agent* for the partnership, who on the 15th April, wrote to O in New York, as follows: "at 18 cts. four months, you may forward 10,000 lbs. of gum, and if you accept this offer, let me know by return mail that I may regulate my foreign orders." On the 16th, T retired from this partnership. *Held*, That the true construction of this offer is, that unless the agent received the notification of its acceptance by return mail, or by



some other mode of conveyance equally as speedy, it was not to be considered as a binding offer; that if the offer in this respect was not complied with, T, the retiring partner, was not bound by it, and that this was a fact exclusively for the consideration of the jury. *Bernard vs. Torrance*, - - - 383

2. To constitute the offer of an agent, the contract of his principal, it must have been accepted according to its terms, and whether it was so accepted, is a question of fact for the jury. - - - *Ib.*
3. Where the proposal of an authorised agent to purchase merchandise is accepted, and substantially complied with by the vendor, his principal is bound, though between the offer and the acceptance, the principal revokes his authority; and this is so, whether the principal is known to the other party or not. - - - - *Ib.*
4. Principals when discovered are ordinarily liable for the contracts of their agents. - - - - *Ib.*
5. A principal authorising an agent to make an offer cannot withdraw to the prejudice of him to whom the offer is made; the liability after the offer is made must continue, if it be accepted; for it is the principal's own offer, though made through an agent. The acceptance must be according to the terms of the offer. - - - - *Ib.*
6. After an agent's power has been revoked, he has no authority to enter into new negotiations, and of course cannot then dispense with conditions attached to proposals previously made by him, so as to bind his principal. Any new stipulation, or dispensation with previously offered stipulations, would make the agreement, not the acceptance of the one offered, but a new agreement. - - - *Ib.*
7. Where an agent proposed to purchase 10,000 lbs. of gum, and directed the vendor to forward it to him, the fact that the vendor consigned the gum to his own correspondent, with directions to deliver it upon arrival, or that he shipped more gum than was ordered, which larger quantity was accepted on its arrival by the agent, who gave his note therefor, cannot be considered as making a

new contract, as to the 10,000 lbs. between the agent and vendor at the time of its actual delivery, nor as a variation from the design of the original agreement. - *Ib.*  
*See Evidence*, 6.

PROCEDENDO.

*See Appeal*, 3.

PROMISSORY NOTE.

*See Donation*, 1, 2, 3, 4.  
 — *Usury*, 1.

RELEASE.

*See Court of Chancery*, 11.  
 — *Evidence*, 6.  
 — *Practice*, 1.  
 — *Surety*, 1, 2, 3.

SALES OF PERSONAL PROPERTY.

1. B sold H a quantity of tobacco, and delivered a bill of parcels, which described it as follows:—  
 “24 kegs of tobacco, branded (*Parkin*) at four months, weighing, &c., at 13½ cents. B had received this tobacco for sale on commission—sold it, and guaranteed the sale to his principal. The purchase was made at the plaintiff's counting room, where the tobacco was. It was branded, as stated in the bill of parcels, and not examined by either party prior to, or at the time of the sale. The price agreed for was a full price for a merchantable commodity; and the brand in question was a favorite one, always considered remarkably fine, though it fluctuated in price from 8 to 13½ cents per pound. The tobacco in part proved unsound, and none of it had been re-sold; the purchaser proposed to return that which was unmerchantable, and pay for the residue. In an action for the price, *HELD*, that there was no implied warranty of quality in this contract; that in relation to the quality of the tobacco, nothing was stipulated; and that the terms on the part of the vendor were complied with by the delivery of the tobacco, branded in conformity with the bill of parcels. *Hyatt vs. Boyle*, - - 110
2. It is a general principle of the common law, that in sales of personal property, the seller is not an-

- answerable for any defects in the quality or condition of the article sold, without there is an express warranty or fraud. - - - *Ib.*
3. The exception to this rule, that where there is no opportunity of inspection, the seller impliedly warrants the quality of the commodity sold, only applies to those cases, where the examination at the time of the sale is, morally speaking, impracticable; as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability. - *Ib.*
4. Where there is a warranty of quality in the sale of a chattel, and an offer to return the goods purchased in due time, if the warranty is violated, the purchaser, in an action against him for the price, may defeat the action, whether the vendor knew of the defect of quality or not; for the *scienter* in such case is immaterial. *Ib.*

See Insurance, 11, 12.

— Principal and Agent, 1, 7.

#### SET-OFF.

See Evidence, 8, 10.

— Judgment, 2.

— Lessor and Lessee, 1.

#### SHERIFF.

1. The sheriff is responsible for the escape of a party arrested in a civil action, or committed for want of bail, though the public jail in which such party is confined is out of repair;—he is bound by public policy for the safe keeping of those whom the law entrusts to his care. *Ste-maker vs. Marriott*, - - - 406
2. The act of 1818, ch. 208, has so far recognized the practice of committing slaves to jail, by justices of the peace, at the request of their owners, for real or supposed offences against them, to be there supported at the expense of such owners, that such a commitment, not made at the instance of a party engaged in the traffic of buying and selling slaves, is to be regarded as made in due course of law, for which the sheriff is responsible accordingly. - - - - - *Ib.*
3. The sheriff who receives the pub-

lic jail from his predecessor without a deed of assignment, is responsible from that period, for the safe keeping of the prisoners there, as if they had been originally committed to his custody. - - - - *Ib.*

#### SLAVES.

See Sheriff, 2.

#### SPECIAL BAIL.

See *Ne Exeat Regno*, 1, 2, 3.

#### SURETY.

1. Where time is given by contract to a principal for the payment of a debt, without the consent of a surety, he will be discharged because he is only bound by the terms of his contract, and any variation of those terms, without his consent, will operate to discharge him. *Claggett, et al. vs. Salmon*, - - - 314
2. A creditor may stipulate with his debtor, giving him time for the payment of his debts, and in the same contract declare, that such forbearance shall not affect the creditor's rights against the debtor's sureties. By the reservation of the remedy against the sureties in the contract for time, the debtor tacitly consents to forego and waive the benefit of such contract, in case the creditor should afterwards find it necessary to resort to the sureties for the full and complete extinguishment of his debt. - - - - - *Ib.*
3. Such a contract between the creditor and principal debtor is not absolute, but conditional and contingent; and in effect, the debtor being at all times responsible to his sureties in case they are proceeded against by the creditor, they cannot claim to be discharged from liability to such creditor. - - - *Ib.*
- See Guardian and Ward, 1.
- *Ne Exeat Regno*, 1, 2, 3.

#### TACKING.

See Court of Chancery, 3.

#### TAXES.

See Lessor and Lessee, 1.

#### TESTATOR.

See Executor and Administrator, 3, 4, 5.  
— Wills and Testament.

TIME.

1. Time is of the essence of a covenant to complete and deliver a piece of work by a fixed day. *Watchman & Bratt vs. Crook*, 239. See Surety, 1, 2, 3.

TRUSTEE.

- See Executor and Administrator, 3, 4, 5.

UNDUE INFLUENCE.

- See Wills and Testaments, 5, 6, 7, 8, 9, 10.

UNITED STATES.

- See Constitutional Law.

USURY.

1. Usury is a question of fact for the determination of a jury. A note made and endorsed in execution of a previous usurious agreement is void. *Thomas vs. Catherall*, 23.

VENDITIONI EXPONAS.

- See Fieri Facias, 1.

VENDOR AND VENDEE.

- See Court of Chancery, 3, 6.

WARRANTY.

- See Sales of Personal Property, 1, 2, 3, 4.

WHARGAGE.

- See City of Baltimore.

WILLS AND TESTAMENT.

1. H, by his will made in 1794, devised to his "two daughters, E and T during their single lives, all the remainder of his land; and after their death or marriage, all the land thisside of the branch, where I now live, I give to my grand-son O, to him, his heirs and assigns forever; And one negro boy Ralph, and in case of his death, to my grand-son V, and in case of his death, to my grand-son I, and in case of his death to my grand-son B, and in case of his death, to my grand-daughter M." Upon the death of the testator, E and T entered. T married, and E died, when O entered, and continued in possession until his death—HELD, that the true construction of this will was, that as

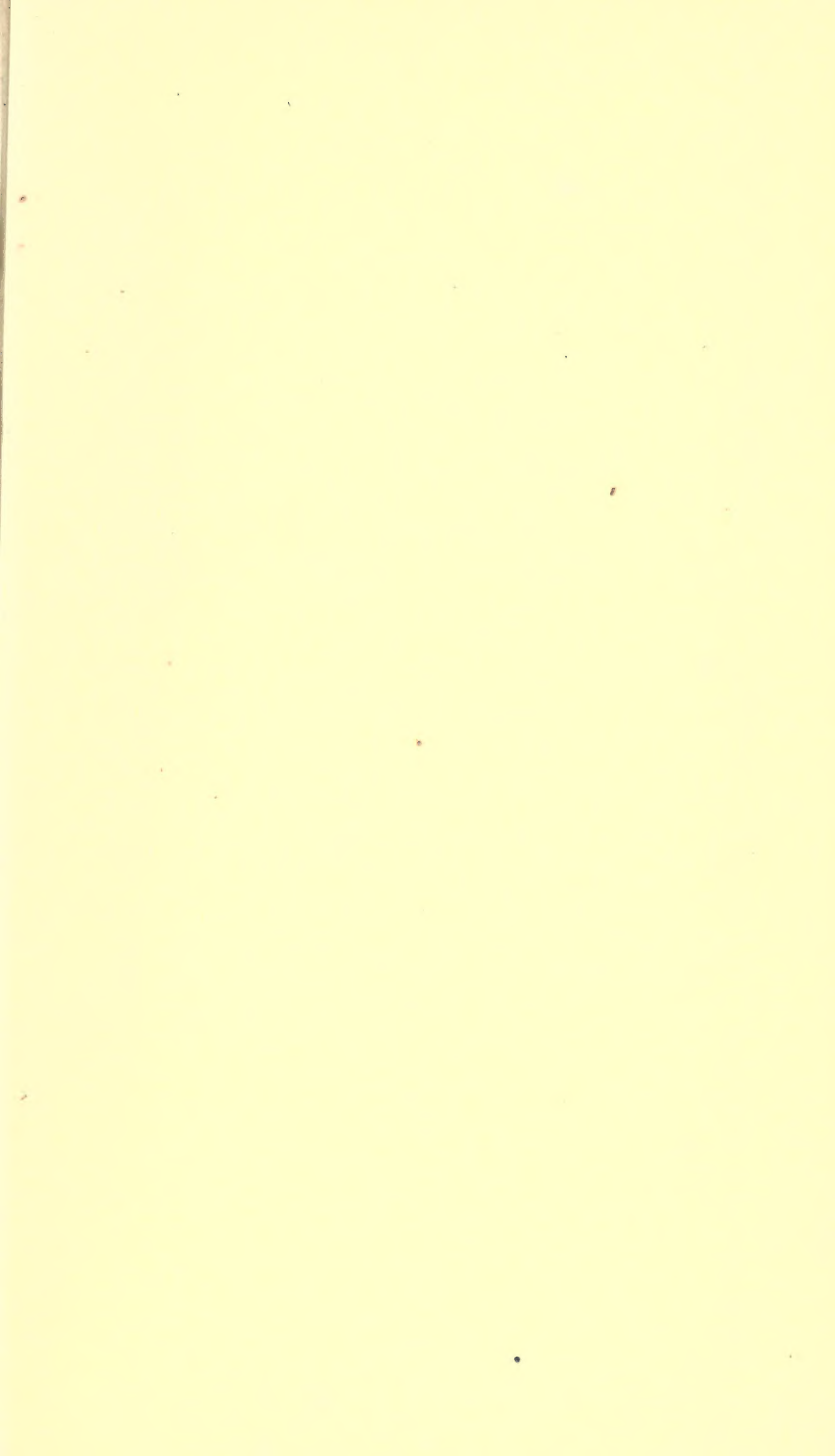
O was living at the time of the termination of the estate devised to E and T, he took an absolute estate in fee, and that the limitation over to V failed to take effect. *Hill vs. Hill*, - - - - - 87

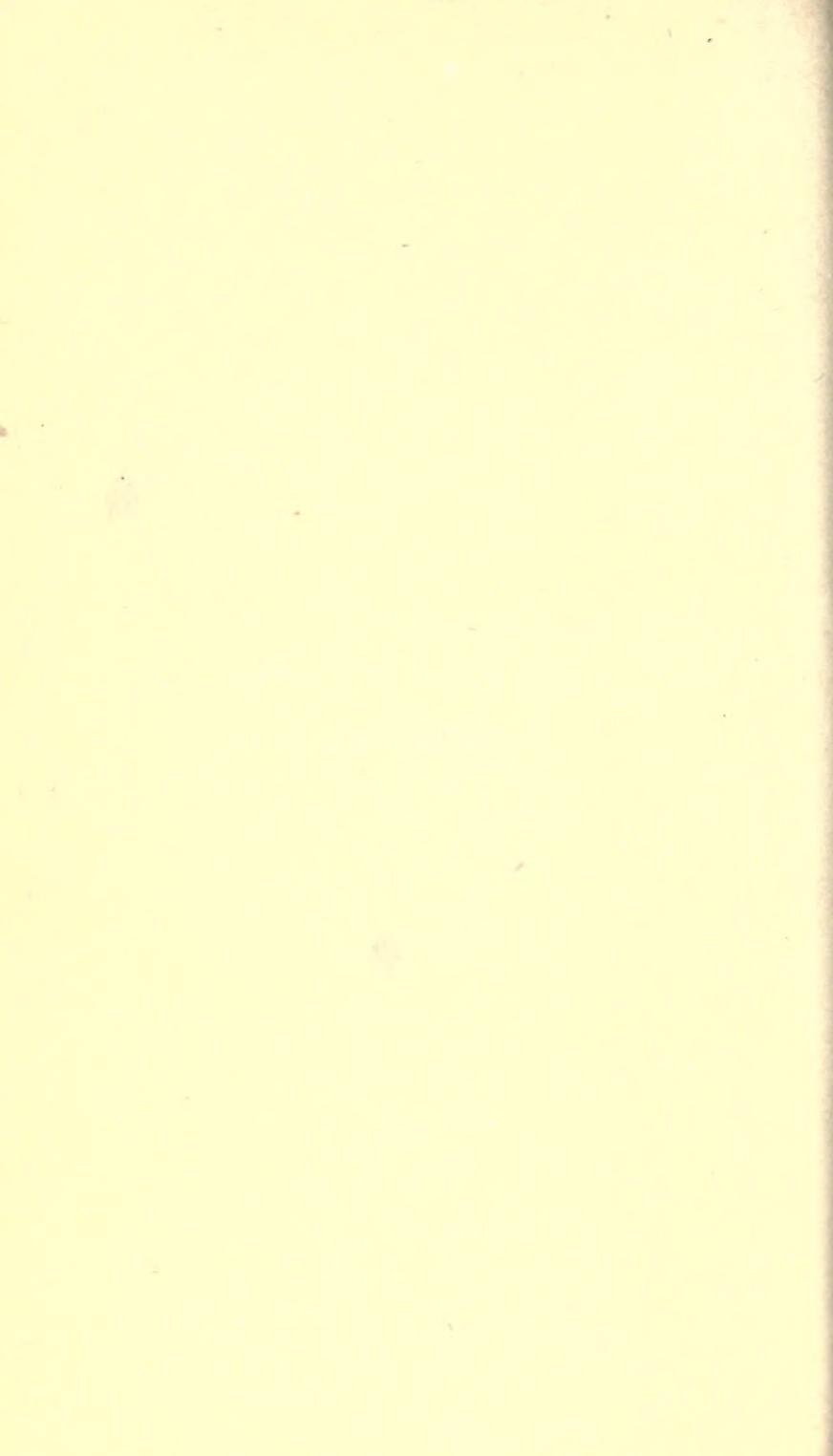
2. The third section of the first sub-ch. of the act of 1798, ch. 101, provides "that no will, testament or codicil, shall be good and effectual for any purpose whatsoever, unless the person making the same, be at the time of executing or acknowledging it, of sound disposing mind, and capable of executing a valid deed or contract." These latter words are of importance in the investigation touching the mental capacity of a testator. He who is not competent to execute a valid deed or contract, is under the testamentary system of the State, incompetent to make a valid will or testament. *Davis Calvert, et al.* 269
3. The testator's capacity is to be determined by the condition of his mind, at the time of his executing the will or testament; and for the purpose of shedding light upon that, evidence of its condition, and of his bodily imbecility, both before and after the period of his executing or acknowledging his will may be produced. It is not of itself sufficient to avoid a will or testament that its dispositions are imprudent, and not to be accounted for. But a will or testament may by its provisions furnish intrinsic evidence involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty. - - - - - *Ib.*
4. The contents of a will or testament; the manner in which it was written and executed; the nature and extent of the estate of the testator; his family and connexions; their condition and relative situation to him; the terms upon which he stood with them; the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself; the



- circumstances under which the will was made; are all proper to be shown to the jury, and often afford important evidence in the decision of the question of a testator's capacity to make a will. - - *Ib.*
5. A will may be avoided also for fraud, importunity, and undue influence. - - - - - *Ib.*
  6. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud; nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession, or persuasion, or flattery unaccompanied by fraud or deceit, and where the testator has not been threatened or put in fear by the flatterer, or persuader, or his power, or dominion over him, will not have that effect: but there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have the effect (under circumstances) to avoid a will. *Ib.*
  7. That degree of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate a will; and this, not only in relation to the person alone by whom it is so procured, but as to all others who are so intended to be benefitted by his undue influence. - - - - - *Ib.*
  8. If any part or clause of a will was first suggested to a testator by any other person, and adopted by such testator, such adoption ought not to be the result of his incapacity or weakness of mind, nor of fraud, circumvention or undue influence, and whether it is so, is for the jury from all the facts and circumstances to decide. - - - - - *Ib.*
  9. To invalidate a will on the ground of fraud, or undue influence, it is necessary that it should have been induced by fraud, circumvention, deception, imposition, or undue influence, operating upon and controlling the testator at the time it was executed, of which, and in what degree he was so influenced and controlled, is for the jury to decide; and it is not necessary, that such fraud or undue influence should have been immediately and directly exerted, at the particular time at which the will was made, nor is it material by whom practiced. *Ib.*
  10. In the trial of issues framed by the Orphans Court upon a *caveat* to a will, the evidence is not necessarily confined to the facts expressly put in issue, but any fact which tends to prove the fact in issue, may be given to the jury. So where the nature of the case makes an inquiry into the true paternity of children, described in the will as the children of the testator, necessary, as where the fraud is alleged to consist in inducing the testator to believe that such children were his own, when they were not, and so directing his bounty to them, that fact, as a part of the machinery of the fraud may be examined into; and upon the same principle the capacity of devisees named, in a will to take the property devised, and the character and consequences of devises over in case of the incapacity of the devisees first named to take, as where they are slaves, may become material for the consideration of the jury. - - - - - *Ib.*
  11. A devise in 1796, that "my son F shall have all the land I have any right, title, or claim to, either by law or equity, except the house and lot, and two acres adjoining," which the testator, by a previous clause in his will, had devised in fee to his six daughters—only passes a life estate to F. *Dougherty vs. Monnett's Lessee.* - - - - - 459  
See Executor and Administrator, 3, 4, 5.
- WITNESS.
- See Evidence, 1, 7.  
— Practice, 2.







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